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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 45.

JESSIE E. THOMPSON, APPELLANT,

vs.

CHARLES N. THOMPSON.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED MAY 5, 1910.

(22,139)

(22,139)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 268.

JESSIE E. THOMPSON, APPELLANT,

vs.

CHARLES N. THOMPSON.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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WEDNESDAY, *February 9th, A. D.* 1910.

No. 2065.

CHARLES N. THOMPSON, Appellant,
vs.
JESSIE E. THOMPSON.

The argument in the above entitled cause was commenced by Mr. J. W. Cox, attorney for the appellant.

THURSDAY, *February 10th, A. D.* 1910.

No. 2065.

CHARLES N. THOMPSON, Appellant,
vs.
JESSIE E. THOMPSON.

The argument in the above entitled cause was continued by Mr. J. W. Cox, attorney for the appellant, and by Mr. W. M. Lewin, attorney for the appellee, and was concluded by Mr. C. M. Fulton, attorney for the appellant.

In the Court of Appeals of the District of Columbia.

No. 2065.

CHARLES N. THOMPSON, Appellant,
vs.
JESSIE E. THOMPSON, Appellee.

Opinion.

(Mr. Justice Van Orsdel delivered the opinion of the Court.)

This is an appeal from a decree of the Supreme Court of the District of Columbia against the appellant upon a suit for maintenance brought against him by the appellee, his wife. For convenience, the parties will be referred to in this opinion as husband and wife.

The parties were married on the 7th day of December, 1905, in the District of Columbia, and lived together as husband and wife until the 13th of June, 1907. The husband is a school teacher by profession, and for several years past has been following his occupation in the District of Columbia, where he has temporarily resided during the school terms. He was born in Loudoun County, Virginia, where he still claims his domicil. The record shows that he is a duly registered and qualified voter in that county; that he owns property there; that he has served on juries there; that he has spent

his time there when he was not actively employed in school work; and that he frequently returns during the course of the school year to look after his business at that point.

On the 29th of July, 1907, the wife filed the bill in the present case for maintenance against the husband, in which she charged the husband with extreme cruelty beginning the day after their marriage and continuing until the 13th of June, 1907, when she alleges she was compelled to leave him.

On the 3rd day of September following, the husband brought suit in the Circuit Court of Loudoun County, Virginia, for a divorce a mensa et thoro, in the course of which, on the 16th day of September, he filed a bill in said Court charging the wife with having, on the 13th day of June, 1907, wilfully abandoned his bed and board and deserted him without any cause whatever, and, notwithstanding his repeated entreaties and endeavors to induce her to return, she had refused to do so. Service by publication was secured, in which the husband in an affidavit upon information and belief declared that the wife was a non-resident of Virginia. In addition to the service by publication, a personal summons was served on the wife in the District of Columbia, and return thereof made by the affidavit of a deputy marshal of this District.

The Virginia Court, after taking testimony, entered a decree in favor of the husband, granting him a divorce a mensa et thoro and divesting each of the parties of all marital rights in the property of the other. Subsequent to the granting of this divorce, and upon the return of the husband to the District of Columbia, he was served with process in the present suit. He thereupon filed his plea, setting up the Virginia decree and the proceedings upon which it was rendered as a bar to the wife's suit in this District. Upon the hearing of the plea, it was overruled, and he was allowed fifteen days in which to answer the bill. The husband answered the bill, and, in his answer, alleged that his domicil, as well as the matrimonial domicil of the parties, was in Loudoun County, Virginia. He denied the charges contained in the bill upon which the wife sought to secure a decree for maintenance, and, upon issue joined, a judgment was entered against the husband awarding the wife seventy-five dollars per month maintenance and an attorney's fee of five hundred dollars. From this judgment the case comes here on appeal.

Counsel for the husband base their claim for a reversal of the decree below upon the following assignments of error:

"1. The Court erred in overruling the plea setting up the Virginia decree as a bar to the action for maintenance.

"2. The Court erred in holding that the wife is entitled to maintenance, notwithstanding the decree of the Virginia Court.

"3. The Court erred in holding, upon the merits of the case as disclosed by the testimony, that the wife is entitled to maintenance."

Lying at the very root of this controversy is the validity of the Virginia decree of divorce. It is insisted by counsel for the husband that this decree affords a complete bar to the right of the wife to

recover in this action. The first section of the Fourth Article of the Constitution of the United States provides: "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof." Congress, in the exercise of the power thus conferred, enacted that "the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken." (U. S. R. S., sec. 905.)

It is clear that this provision of the Constitution was intended to promote certainty and uniformity among the States, and to regard the judgments of one State as final and conclusive in all the other States, except when challenged for lack of jurisdiction of the court of the State where originally rendered. It is elementary that, where the full faith and credit clause of the Constitution is invoked to compel in one State the enforcement of a judgment rendered in another, the question of the jurisdiction of the court entering the decree over the subject-matter and person of the defendant is always an open one. National Exchange Bank Co. vs. Wyley, 195 U. S., 257.

By the Code of Virginia, sec. 2259, the circuit and corporation courts, on the chancery side, have jurisdiction of suits for annulling or affirming marriages and for divorce. It requires that, before a suit for the annulment of a marriage or for divorce shall be maintainable, one of the parties shall have been domiciled in the State for at least one year, and that the suit shall be brought in the county or corporation in which the parties last cohabited, or, at the option of the plaintiff, in the county or corporation in which the defendant resides, if a resident of the State, and if not a resident, in the county or corporation in which the plaintiff resides.

There can be no doubt of the power of the legislature of a State to prescribe the conditions upon which the marriage relation between its own citizens may be dissolved. When one of the parties is guilty of conduct which, by the laws of the State, authorizes the other to apply for and secure a divorce, and abandons the State of the matrimonial domicil, it is within the power of the legislature to provide means whereby the courts, on behalf of the injured and abandoned party, may extend their process into another State and acquire jurisdiction over the offending party to render a decree of dissolution of the marriage relation that will be accorded full faith and credit in the State to which the offending party has fled. Pennoyer vs. Neff, 95 U. S., 714; Cheely vs. Clayton, 110 U. S., 701; 2 Bishop on Marriage & Divorce, sec. 156.

This brings us to the Virginia decree, which reads as follows:

"It appearing that the complainant hath proceeded regularly at Rules to mature his suit against defendant, who is a non-resident of Virginia, both by personal service of process and by publication, in the mode prescribe by statute, this case was set down for hearing and came on this day to be heard on said proceedings at Rules, the bill

of complaint and the depositions of witnesses, regularly taken and returned to the Court.

"On consideration whereof, the Court being of the opinion that the complainant hath made out his case by legal evidence, doth adjudge, order and decree that the prayer of the bill be and the same is hereby granted; that the complainant Charles N. Thompson, be and hereby is granted a divorce a mensa et thoro from said defendant, Jessie E. Thompson; and that each of them be and he and she are divested of all marital rights in the other's property.

"And it is further ordered that this cause be placed upon the suspended docket with leave to the complainant to apply for further relief whenever he may be advised that he is entitled thereto."

We think the case of Atherton vs. Atherton, 181 U. S., 155, is decisive of this case. The facts in that case and this are identical. In that case the facts are stated by the court as follows: "On October 17, 1888, the parties were married at Clinton, Oneida County, New York, the plaintiff being a resident of that place, and the defendant a resident of Louisville, Kentucky. Immediately after the marriage, the parties went to and resided at Louisville, in the house with the defendant's parents, had a child born to them on January 8, 1890, and there continued to reside as husband and wife until October 3, 1891. Then, owing to his cruel and abusive treatment, without fault on her part, she left him, taking the child with her, and in a few days thereafter, returned to her mother at Clinton, and has ever since resided there with her mother, and is a resident and domiciled in the State of New York, and has not lived or cohabited with the defendant. When she so left him and went to Clinton, she did so with the purpose and intention of not returning to the State of Kentucky, but of permanently residing in the State of New York."

In the case at bar the husband was born and reared in Loudoun County, Virginia, where he resided at the time of his marriage and where the matrimonial domicil was maintained up to the time of the granting of the decree of divorce. The wife at the time of the marriage was a resident of the District of Columbia. They were married in this District, temporarily residing here during that portion of the year when the husband's occupation of a school teacher demanded his presence, but the matrimonial domicil was established at the domicil of the husband in Virginia and remained there until, because of his alleged mistreatment and abuse, the wife abandoned him and established her residence in the District of Columbia. It will be observed that the facts, upon which the jurisdiction of the court to enter a decree of divorce in favor of the husband that is entitled to full faith and credit in the District of Columbia is based, are in all particulars the same as those upon which the Supreme Court required the New York courts to accord full faith and credit to the Kentucky decree in the case of Atherton vs. Atherton.

In that case, after the court made an exhaustive review of the authorities, it upheld the Kentucky decree as entitled to full faith and crédit in New York and as constituting a conclusive bar to

the action of the wife for divorce in the latter State. The court in its conclusion said: "We are of opinion that the undisputed facts show that such efforts were required by the statutes of Kentucky, and were actually made, to give the wife actual notice of the suit in Kentucky, as to make the decree of the court there, granting a divorce upon the ground that she had abandoned her husband, as binding on her as if she had been served with notice in Kentucky, or had voluntarily appeared in the suit. Binding her to that full extent, it established, beyond contradiction, that she had abandoned her husband, and precludes her from asserting that she left him on account of his cruel treatment. To hold otherwise would make it difficult, if not impossible, for the husband to obtain a divorce for the cause alleged, if it actually existed. The wife not being within the State of Kentucky, if constructive notice, with all the precautions prescribed by the statutes of that State, were insufficient to bind her by a decree dissolving the bond of matrimony, the husband could only get a divorce by suing in the State in which she was found; and by the very fact of suing her there he would admit that she had acquired a separate domicil, (which he denied), and would disprove his own ground of action that she had abandoned him in Kentucky."

But it is insisted by counsel for the wife that the Virginia decree is not entitled to full faith and credit in this District under the decision of the Supreme Court in the case of Haddock vs. Haddock, 201 U. S., 562. The facts in that case are entirely different from those in the case at bar. There, the matrimonial domicil was in New York State, and the husband abandoned the wife, leaving her at the matrimonial domicil, and took up his residence in the State of Connecticut, where he subsequently secured a decree of divorce upon constructive service. The decree was given upon the wrongful representation of the husband that the wife had deserted him when, in fact, he was the one guilty of desertion. It will be observed that the facts in that case do not correspond with those in the case before us. There, the husband abandoned the wife in the State of the matrimonial domicil, and fled to a foreign State, where he secured a decree of divorce which he sought to have accorded full faith and credit in the State of the matrimonial domicil. Here, the wife abandoned the husband in the State of the matrimonial domicil, where the husband subsequently secured a decree of divorce which he seeks to have given full faith and credit in the jurisdiction to which the wife fled and took up her residence. The decision in Atherton vs. Atherton, supra, is approved by the court in the decision in Haddock vs. Haddock, where Mr. Justice White, speaking for the majority of the Court, said: "So also it is settled that where the domicil of a husband is in a particular State, and that State is also the domicil of matrimony, the Courts of such State having jurisdiction over the husband may, in virtue of the duty of the wife to be at the matrimonial domicil, disregard an unjustifiable absence therefrom, and treat the wife as having her domicil in the State of the matrimonial domicil for the purpose of the dissolution of the marriage, and as a result have power to render a judgment dissolv-

ing the marriage which will be binding upon both parties, and will be entitled to recognition in all other States by virtue of the full faith and credit clause."

Inasmuch as the decision in Haddock vs. Haddock is based upon a state of facts the exact antithesis of that in the case at bar, and the facts in Atherton vs. Atherton are exactly similar to those in the case before us, we will not concern ourselves with the distinctions in the Haddock case, but will adhere to the decision in the Atherton case as binding upon us and conclusive of the question here under consideration.

The question of whose conduct it was that led to the abandonment of the husband and the matrimonial domicil by the wife becomes immaterial, since in the Atherton case, as we have observed, the court refused to permit that question to be inquired into in New York for the purpose of impeaching the Kentucky decree. The Kentucky decree having been secured in the State of the matrimonial domicil at the time of the separation upon the ground of desertion by the wife, it foreclosed all inquiry in New York as to the offending party. So here, the Virginia decree having been awarded upon evidence to the satisfaction of the courts of the State that the wife wrongfully deserted the husband, full faith and credit would not be accorded by permitting an inquiry into the same question in this District for the purpose of impeaching the foreign decree. We must treat this question as foreclosed by the Virginia decree. It is insisted, however, that, conceding the jurisdiction of the Virginia court to enter a proper decree of divorce to the husband, the proceedings, as shown by the judgment roll, were so defective as not to give the court, under the statutes of that State, jurisdiction over the wife, and that the decree is void in Virginia. Section 3230 of the Virginia Code, among other things, provides: "On affidavit that a defendant is not a resident of this State, * * * an order of publication may be entered against such defendant."

The rule as to the sufficiency of the affidavit for service by publication is well stated in Atkins vs. Atkins, 9 Neb., 191, as follows: "The rule may be stated thus: If there is a total want of evidence upon a vital point in the affidavit, the court acquires no jurisdiction by publication of the summons; but where there is not an entire omission to state some material fact, but it is insufficiently set forth, the proceedings are merely voidable." In the present case, if the decree of divorce granted the husband in Virginia is void, the Courts of the District of Columbia have jurisdiction to grant the wife the relief prayed for in her bill. If the Virginia court had jurisdictional power to grant the decree of divorce, however irregular and erroneous the proceedings, the decree cannot be disturbed. The proceedings may have been such as to render the decree voidable, but not void. If only voidable, it cannot be attacked in a collateral proceeding.

It has been generally held that an affidavit for service by publication in a divorce case made upon information and belief as was done in this case is sufficient to support the validity of the decree. In Pettiford vs. Zoellner, 45 Mich., 357, Mr. Justice Graves, consider-

ing a statute similar to the one here under consideration which did not specifically require a positive affidavit, said: "It is contended that this affidavit presents no facts which could give the officer jurisdiction to make the order, the deponent merely testifying to information and belief and not even giving the sources of his information. That this affidavit is not what it ought to have been may be fully admitted; but when it is claimed that the order of publication and the subsequent decree of the court are void for this reason, the court may well hesitate before acceding to a construction so far-reaching and so destructive. * * * Coming to the proceeding in question, the statute does not assume to explain what shall amount to proof, but simply provides that proof of the fact shall be made by affidavit; the officer is to find enough in the affidavit to satisfy his judgment, enough to amount to proof to his mind, and if the contents of the affidavit tend to make out what is required as the basis for the order, it contains sufficient to afford his judgment the materials on which to exercise itself, and his decision cannot be held void for defect in the proof offered to him." To the same effect are Malaer vs. Damron, 31 Ill. App., 572; Walter vs. De Graff, 19 Abb. N. C., (N. Y.), 406.

We are of the opinion that the matter here complained of does at most, amount to a mere irregularity in the proceedings. The Virginia Court had jurisdiction of the subject-matter of the suit, and we think there is sufficient shown by the record to give the court jurisdiction of the person of the defendant for the purposes of the decree entered. There was a substantial compliance at least with the provisions of the Virginia statute authorizing constructive service. Where this appears, it will be presumed that the Court had sufficient evidence before it to satisfy it that all the requirements of the statute had been satisfied. Certainly in the absence of any direct attack upon this decree in the courts of the State where rendered, we would not be justified in holding it void, except upon the clearest proof of a total failure of jurisdiction over the defendant in the foreign court. No such condition is disclosed by this record.

The distinction between the effect to be given in collateral proceedings to void judgments and judgments that are merely erroneous is clearly expressed by Mr. Justice Baldwin in Voorhees vs. Bank of United States, 10 Pet., 449: "The line which separates error in judgment from the usurpation of power, is very definite: and is precisely that which denotes the cases where a judgment or decree is reversible only by an appellate court, or may be declared a nullity collaterally, when it is offered in evidence in an action concerning the matter adjudicated, or purporting to have been so. In the one case, it is a record importing absolute verity: in the other mere waste paper: there can be no middle ground assigned to judicial proceedings, which are irreversible for error. Such is their effect between the parties to the suit: and such are the immunities which the law affords to a plaintiff who has obtained an erroneous judgment or execution."

The rule as to the effect to be given the judgment of a court

of a sister state in a collateral proceeding is stated in Kinnier vs. Kinnier, 45 N. Y., 535, as follows: "A judgment of a sister State cannot be impeached by showing irregularity in the forms of the proceeding, or a non-compliance with some law of the State where the judgment was rendered relating thereto, or that the decision was erroneous. Jurisdiction confers power to render the judgment, and it will be regarded as valid and binding until set aside in the court in which it was rendered."

Inasmuch as the Virginia decree is res adjudicata and binding in this District under the full faith and credit clause of the Constitution, it follows that the bill below should have been dismissed upon the plea of the Virginia decree in bar of this action. It has been held in Virginia in Harris vs. Harris, 31 Grat., 13, that where the wife abandons the husband, and he has not committed any breach of the marital duty, she is not entitled to separate maintenance. If we are to give full faith and credit to the Virginia decree, we must presume that the evidence of abandonment on the part of the wife, and the absence of blame on the part of the husband, was established to the satisfaction of the court making the decree. This rule was stated by Mr. Justice Swayne in Cornett vs. Williams, 20 Wall., 227, 250, as follows: "The settled rule of law is that jurisdiction having attached in the original case, everything done within the power of that jurisdiction, when collaterally questioned, is to be held conclusive of the rights of the parties, unless impeached for fraud. Every intendment is made to support the proceeding. It is regarded as if it were regular in all things and irreversible for error. In the absence of fraud no question can be collaterally entertained as to anything lying within the jurisdictional sphere of the original case. Infinite confusion and mischiefs would ensue if the rule were otherwise." Hence that question is not open for investigation here. However, it was conceded at bar that, if the Virginia decree was not void, this action could not, upon any theory, be maintained.

The personal service made in this District is assailed on the ground that it was made too late. This objection cannot affect the result, since we have held the constructive service sufficient to give the Virginia court jurisdiction of the parties. The Virginia Code, Section 3232, among other things, provides: "Personal service of the summons, scire facias, or notice may be made by any person not a party to or otherwise interested in the subject-matter in controversy, on a non-resident out of this State, which service shall have the same effect, and no other as an order of publication duly executed, or the publication of a copy of process or of notice under this chapter, as the case may be. In such case the return must be made under oath, and must show the time and place of such service, and that the defendant so served is a non-resident of this State. Upon any trial or hearing under this section such judgment, decree or order shall be entered as may appear just."

It will be observed that, if the personal service was good, it would take the place of service by publication, but, in no event, could the attempt at personal service invalidate a constructive service

otherwise sufficient. It is commendable practice, where summons or notice has been published, to give personal service to the non-resident defendant, and such personal service is never regarded as an abandonment of notice by publication. As was said by the court in a divorce proceeding in Burnes vs. Burnes, 61 Mo. App., 612: "Thus, to supplement the constructive service of notice by publication, with that of actual notice, would seem to be commendable rather than reprehensible; especially so in a case of this kind, and ought not to have the effect to invalidate or supersede the first service."

It is unnecessary to review the other questions presented by this appeal. The decree is reversed with costs, and the cause is remanded with instructions to the Court below to enter an order vacating the decree and dismissing the bill.

Reversed.

TUESDAY, *April 5th, A. D.* 1910.

No. 2065. April Term, 1910.

CHARLES N. THOMPSON, Appellant,
vs.
JESSIE E. THOMPSON.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the decree of the said Supreme Court in this cause be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby remanded to the said Supreme Court with directions to enter an order vacating the decree and dismissing the bill.

Per Mr. JUSTICE VAN ORSDEL,
April 5, 1910.

In the Court of Appeals of the District of Columbia.

No. 2065.

CHARLES N. THOMPSON, Appellant,
vs.
JESSIE E. THOMPSON.

The appellee moves the Court to modify its decree in this case by providing that the appellant pay the costs both in this Court and the Court below.

WM. M. LEWIN,
Attorney for the Appellee.

the Washington manager of the Equitable Life Assurance Society of the United States.

2. That in the conduct of its extensive life insurance business the said Society uses the mortality, or annuity, table known as The American Experience Table, which table is almost universally relied upon and used by the life insurance companies of America.

3. That as shown by said table the expectancy of life of a man or woman is as follows:

At the age of twenty six (26), the expectancy of such life is thirty eight and one-tenth (38 1/10) years.

At the age of twenty seven (27), the expectancy of such life is thirty-seven and four-tenths (37 4/10) years.

At the age of forty-three (43), the expectancy of such life is twenty six (26) years.

At the age of forty-four (44), the expectancy of such life is twenty-five and three-tenths (25 3/10) years.

4. That according to the Carlisle Mortality, or annuity, table such expectancy is as follows:

At the age of 26, 37.14 years.
" " " " 27, 36.41 "
" " " " 43, 25.71 "
" " " " 44, 25.09 "

GEO. C. JORDAN.

Subscribed and sworn to before me in said District of Columbia this 21st day of April, A. D. 1910. Witness my hand and notarial seal.

[NOTARIAL SEAL.] RUTLEDGE WILLSON,
Notary Public in and for the District of Columbia.

(Endorsed:) No. 2065. Charles N. Thompson vs. Jessie E. Thompson. Affidavit showing expectancy of life. The Clerk will please file. Court of Appeals, District of Columbia. Filed Apr. 21, 1910. Henry W. Hodges, Clerk.

Supreme Court of the United States.

JESSIE E. THOMPSON, Appellant,
vs.
CHARLES N. THOMPSON, Appellee.

And now comes Jessie E. Thompson, appellant, and makes and files this her assignment of errors:

I. The Court of Appeals of the District of Columbia erred in reversing the decree of the Supreme Court of the District of Columbia, rendered July 13, A. D. 1909, and in directing said last named court to dismiss the bill of complaint therein exhibited in the cause between this appellant and Charles N. Thompson, the above named appellee.

II. The said Court of Appeals erred in holding that the decree rendered by the Circuit Court of Loudoun County, Virginia, on the

19th day of October, A. D. 1907, purporting to divorce a mensa et thoro this appellant from the said appellee.

III. The said Court of Appeals erred in holding that said alleged decree of divorce is conclusive as to this appellant and binding upon her in said District of Columbia.

WM. M. LEWIN,
Attorney for Appellant.

The Court is of opinion that the party is not entitled to an appeal. The conditions are different from those in Smith vs. Whitney, 116 U. S. 167.

Per curiam:

SETH SHEPARD,
Chief Justice.

April 22, 1910.

(Endorsed:) No. 2065. Jessie E. Thompson, Appellant, vs. Charles N. Thompson, Appellee. The Clerk of the Court of Appeals will please file this assignment of errors in Case No. 2065 in said Court of Appeals. Wm. M. Lewin, attorney for the appellant. Court of Appeals, District of Columbia. Filed Apr. 21, 1910. Henry W. Hodges, Clerk.

THURSDAY, *April 21st, A. D.* 1910.

No. 2065.

CHARLES N. THOMPSON, Appellant,
vs.
JESSIE E. THOMPSON.

The motion for the allowance of an appeal to the Supreme Court of the United States in the above entitled cause was submitted to the consideration of the Court by Mr. W. M. Lewin, attorney for the appellee, in support of motion.

Court of Appeals of the District of Columbia.

No. 2065.

CHARLES N. THOMPSON, Appellant,
vs.
JESSIE E. THOMPSON, Appellee.

I, Jessie E. Thompson, the subscriber, the above named appellee being first duly sworn, on my oath depose and say:

That Ada Louise Eliot Thompson, the minor child mentioned in these proceedings, is in good health. That said child was born November 24th, A. D. 1907.

That I have carefully examined the mortality table known as the Carlisle Table of Mortality and find that the expectancy of life as shown by said table is as follows:

At the age of two years such expectancy is forty seven and fifty-five hundredths years.

At the age of three years such expectancy is forty nine and eighty-two hundredths years.

JESSIE E. THOMPSON.

Subscribed and sworn to before me in said District of Columbia this 22d day of April, A. D. 1910. Witness my hand and notarial seal.

[NOTARIAL SEAL.] RUTLEDGE WILLSON,
Notary Public in and for the District of Columbia.

(Endorsed:) No. 2065. Thompson vs. Thompson. Affidavit of Jessie E. Thompson as to expectancy of life of child. Please file. Court of Appeals, District of Columbia. Filed Apr. 22, 1910. Henry W. Hodges, Clerk.

FRIDAY, *April 22d, A. D.* 1910.

No. 2065.

CHARLES N. THOMPSON, Appellant,
vs.
JESSIE E. THOMPSON.

On consideration of the motion for the allowance of an appeal to the Supreme Court of the United States in the above entitled cause, It is by the Court this day ordered that said motion be and the same is hereby denied. And it is further ordered that the mandate in said cause be and the same is hereby stayed until further order, to enable the appellee to apply to the Supreme Court of the United States for the allowance of an appeal or the writ of certiorari.

Court of Appeals of the District of Columbia.

No. 2065.

CHARLES N. THOMPSON, Appellant,
vs.
JESSIE E. THOMPSON.

The appellee, Jessie E. Thompson, conceiving herself aggrieved by the decree of the Court of Appeals of the District of Columbia, entered in the above entitled cause on the fifth day of April, A. D. 1910, hereby prays an appeal to the Supreme Court of the United States and that the transcript of the proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

WM. M. LEWIN,
Attorney for Appellee.

May 4, 1910.

Appeal allowed on appellant's giving bond in the penal sum of $500 conditioned according to law and approved by the undersigned to operate as a supersedeas.

MELVILLE W. FULLER,
Chief Justice of the United States.

(Endorsed:) Court of Appeals, D. C. No. 2065. Thompson vs. Thompson. Petition for allowance of appeal to the Supreme Court of the United States. Court of Appeals, District of Columbia. Filed May 4, 1910. Henry W. Hodges, Clerk.

Know all men by these presents, That we, Jessie E. Thompson, of the District of Columbia, as principal, and Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto Charles N. Thompson in the full and just sum of five hundred (500) dollars, to be paid to the said Charles N. Thompson, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, by these presents. Sealed with our seals and dated this 4th day of May, in the year of our Lord one thousand nine hundred and ten.

Whereas, lately at a term of the Court of Appeals of the District of Columbia, in a suit depending in said Court, between said Charles N. Thompson and said Jessie E. Thompson, a decree was rendered against the said Jessie E. Thompson, and the said Jessie E. Thompson having obtained an appeal and filed a copy thereof in the Clerk's Office of the said Court to reverse the decree in the aforesaid suit, and a citation directed to the said Charles N. Thompson citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, That if the said Jessie E. Thompson shall prosecute her said appeal to effect, and answer all damages and costs if she fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

JESSIE E. THOMPSON. [SEAL.]
WM. M. LEWIN.
FIDELITY AND DEPOSIT COMPANY
OF MARYLAND,
By H. B. HODGE, *Attorney in Fact.*

Sealed and delivered in presence of—
WM. LEWIN.

[Seal of Fidelity and Deposit Company.]

Approved by—
MELVILLE W. FULLER,
Chief Justice of the United States.

(Endorsed:) No. 2065. Charles N. Thompson, Appellant, vs. Jessie E. Thompson. Supersedeas bond on Appeal to Supreme Court U. S. Court of Appeals, District of Columbia. Filed May 4, 1910. Henry W. Hodges, Clerk.

UNITED STATES OF AMERICA, *ss:*

To Charles N. Thompson, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to an appeal filed in the Clerk's Office of the Court of Apeals of the District of Columbia, wherein Jessie E. Thompson is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 4th day of May, in the year of our Lord one thousand nine hundred and ten.

MELVILLE W. FULLER,
Chief Justice of the United States.

Service accepted this 4th day of May A. D. 1910.

LECKIE, FULTON & COX,
Att'ys for Charles N. Thompson, Appellant.

[Endorsed:] Court of Appeals, District of Columbia. Filed May 4, 1910. Henry W. Hodges, Clerk.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 521 inclusive contain a true copy of the transcript of record and proceedings of said Court of Appeals, in the case of Charles N. Thompson, Appellant, vs. Jessie E. Thompson, No. 2065, April Term, 1910, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 4th day of May A. D. 1910.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 22,139. District of Columbia Court of Appeals. Term No. 268. Jessie E. Thompson, appellant, vs. Charles N. Thompson. Filed May 5th, 1910. File No. 22,139.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 268.

JESSIE E. THOMPSON, APPELLANT,

vs.

CHARLES N. THOMPSON.

PETITION.

To the Honorable the Supreme Court of the United States:

The petition of Jessie E. Thompson, the subscriber, the above-named appellant, respectfully represents:

1. That she is a citizen of the United States and a resident of the District of Columbia.

2. That she is absolutely unable to raise the money to pay the cost of printing the record in this court, the costs of which have been duly estimated at $970.

3. That her daughter, four years old, is dependent upon her care, and that this petitioner is now without employment, her temporary appointment at the United States Census Bureau having expired recently.

4. That her only property consists of a contingent interest, upon which she is unable to realize anything,

and that her mother, with whom she resides, is without the necessary means wherewith to extend the requisite aid.

5. That, as she is advised and believes, the main question involved in her appeal is one of law in connection with the application of the full faith and credit clause of the Constitution of the United States.

6. That, through the generous courtesy of the clerk of the Court of Appeals of the District of Columbia, she has obtained nine (9) printed copies, and no more, of the record in that court which have been handed to the clerk of this court, and with the one on file as a part of the record in this court, make ten (10) copies altogether.

7. That a friend, whose means are limited, will lend this petitioner a sum sufficient to pay the cost of printing the necessary additional parts of the record; to wit, the opinion of the Court of Appeals and the parts relating to proceedings subsequent thereto.

8. That the appellee's counsel of record in the said Court of Appeals received three copies of said printed record, which they can use in their preparation and conduct of the case in this court.

The premises considered, the petitioner prays as follows:

That this Honorable Court will permit this petitioner to prosecute her appeal upon the said ten (10) copies of the record without printing more than the aforementioned additional portions; to wit, the opinion of the Court of Appeals and the portions of the record subsequent thereto.

And for such other and further relief as may be proper.

JESSIE E. THOMPSON.

WM. M. LEWIN,
Attorney for the Petitioner.

DISTRICT OF COLUMBIA, *to wit:*

I, Jessie E. Thompson, on oath say that I have read the foregoing petition by me subscribed and know the contents thereof; that the matters and things therein stated of my own knowledge are true and those stated upon information and belief I believe to be true.

JESSIE E. THOMPSON.

Subscribed and sworn to before me this 12th day of March, 1912.

[NOTARY'S SEAL.] GEORGE W. REIK,
Notary Public, D. C.

Office Supreme Court, U. S.
FILED.
OCT 15 1912
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 45.

JESSIE E. THOMPSON, APPELLANT,

vs.

CHARLES N. THOMPSON.

APPELLANT'S BRIEF.

WM. M. LEWIN,
Attorney for Appellant.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 45.

JESSIE E. THOMPSON, APPELLANT,

vs.

CHARLES N. THOMPSON.

Statement.

This is an appeal from a decree of the Court of Appeals of the District of Columbia (35 App. Cas. D. C., 14). The parties are husband and wife. The wife filed a bill in the Supreme Court of the District of Columbia (1), under section 980 of the District Code, for maintenance of herself and child. The husband interposed a plea (17) to the effect that he had been granted a divorce *a mensa et thoro* by a court of the State of Virginia.

The plea was overruled (25), whereupon the husband answered (5) denying his wife's charges of cruelty and desertion, averring that she had deserted him (10); again setting up (12) the Virginia divorce (24), and demanding that it be given full faith and credit (13). Upon joinder of issue (25) and testimony in behalf of the respective parties (26) the Supreme Court of the District of Columbia decreed that the husband pay to the wife seventy-five dollars ($75) a

In

month for the maintenance of herself and their minor child, besides five hundred dollars ($500) for counsel fees.

The husband appealed to the Court of Appeals (486), which court reversed the decree of the Supreme Court of the District of Columbia and remanded the cause with directions to vacate the decree and dismiss the bill (504).

From the decree of reversal the wife appealed to this court (509). The opinion of the Court of Appeals will be found at page 495 of the record.

The bill in this case, duly verified, was filed July 29, 1907 (1). Subpœna to answer was issued at the same time (492), alias and pluries writs being duly issued and returned, without break, until the husband was served November 18, 1907 (493).

It is disclosed by a duly certified copy of the record of the Virginia proceedings (18), marked Exhibit A and made a part of the husband's answer (18), that the Virginia proceedings in which the divorce *a mensa et thoro* was decreed were begun September 3, 1907, by the issuance of a summons (18-19) to the wife, under section 3223 of the Virginia Code, to appear on the third Monday in September (September 16), 1907, to answer a bill exhibited against her by her husband.

On the same day, as a basis for an order of publication (19), the husband filed an affidavit, under section 3230 of the Virginia Code, made, however, upon information and belief, that the wife was at that time not a resident of the State of Virginia (20).

Upon this affidavit the clerk issued an order of publication against the wife, ordering her to appear within fifteen days after due publication of the order (20).

There is an editor's certificate (20) that the order of publication was published for the time required by section 3231 of the Virginia Code, four weeks from September 5, 1907.

The clerk filed a certificate, under section 3231 of the Virginia Code, that the order of publication was duly posted at the court-house door (21).

On September 16, "the third Monday in September," the return day of the summons (19), the husband filed in the Circuit Court of Loudoun County, Virginia, a bill for divorce *a mensa et thoro* (21), under section 2258 of the Virginia Code, on the ground of desertion.

In addition to publication, the non-resident wife was served personally with the Virginia summons in the District of Columbia (19), under the latter part of section 3232 of the Virginia Code.

The return of Stephen B. Callahan, United States deputy marshal, District of Columbia (19), shows that such personal service was made September 21, 1907.

On October 19, 1907, the Virginia court passed a decree granting to the husband a divorce *a mensa et thoro*, and further ordering that the respective parties be divested of all marital rights in each other's property (24). This decree is a part of the record ("defendant's Exhibit A") made a part of the husband's plea in the District of Columbia proceedings (17), and upon the plea being overruled by Justice Gould (25) the same record is made a part of the husband's answer to the bill of complaint in the Supreme Court of the District of Columbia (18). From the decree of Mr. Justice Barnard (486), decreeing maintenance and the custody of the child, the husband appealed to the Court of Appeals of the District of Columbia (486), and filed a supersedeas bond on the 15th day of July, 1909 (486).

On April 5, 1910, the Court of Appeals reversed the decree of the Supreme Court of the District of Columbia and remanded the cause, with directions to vacate the decree and dismiss the bill (503).

On motion, the decree of the Court of Appeals was modified by requiring the husband to pay the costs in that court (504).

Whereupon the wife filed an affidavit, made by Dr. Johnson Eliot, a physician of said District, that, in his opinion, the health of the parties is good, and that their expectancy

of life is equal to that indicated by the standard mortality tables (505). The wife made a similar affidavit as to her child, and showed the expectancy of life in the child's case to be more than forty-seven years (508).

She also filed the affidavit of George C. Jordan, showing the expectancy of either the husband or the wife to exceed twenty-five years (506).

The wife assigned errors (506) and moved for the allowance of an appeal to this court (507), which motion was overruled (508). Whereupon application was made to the Chief Justice, who, on May 4, 1910 (508), allowed the appeal, the appellant giving the required supersedeas bond (509), whereupon the case was duly brought to this court.

Assignments of Error. (506.)

I. The Court of Appeals of the District of Columbia erred in reversing the decree of the Supreme Court of the District of Columbia, rendered July 13, A. D. 1909 (486), and in directing said last-named court to dismiss the bill of complaint therein exhibited in the cause between this appellant and Charles N. Thompson, the above-named appellee.

II. The said Court of Appeals erred in holding that the decree rendered by the Circuit Court of Loudoun County, Virginia, on the 19th day of October, A. D. 1907, purporting to divorce *a mensa et thoro* this appellant from the said appellee (24) [*is valid*].

III. The said Court of Appeals erred in holding that said alleged decree of divorce (24) is conclusive as to this appellant and binding upon her in said District of Columbia.

Specifications of Error.

The Court of Appeals of the District of Columbia erred:

I.

In holding that the decree of the Virginia court, divorcing the parties *a mensa et thoro*, is entitled to full faith and credit in the District of Columbia.

II.

In holding that the affidavit of the appellee (19, 20) as basis for an order of publication against the appellant, defendant in the Virginia suit, was a sufficient affidavit to support the validity of the Virginia decree (500).

III.

In holding that the personal service made by S. B. Callahan (19) subsequent to the return day therein did not vitiate the constructive notice by publication (20) and render the decree void.

The Jurisdiction of this Court.

Before taking up the specifications of error the attention of the court will be called to the question of the jurisdiction of this court.

The appeal is based upon the provisions of section 233 of the Code of Law for the District of Columbia, providing for appeals to this court from the Court of Appeals of said District from a final decree *in all cases in which the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars.*

The provisions of the Code under which the suit is brought are as follows:

Whenever any husband shall fail or refuse to maintain his wife and minor children, if any, although able to do so, the court, on application of the wife, may decree that he shall pay her, periodically, such sums as would be allowed to her as permanent alimony in case of divorce for the maintenance of herself and the minor children committed to her care by the court, and the payment thereof may be enforced in the same manner as directed in regard to such permanent alimony.

Code D. C., section 980.

Section 980 of the Code is declaratory of the inherent powers of a court of equity, and *alimony* and *maintenance* mean the same thing.

Lesh *vs.* Lesh, 21 App. Cas. D. C., 475, 488.

It would seem that prior to the effect of the Code (January 1, 1902, ~~section 301~~) the amount of alimony, even when in arrears, might, for cause shown, be changed by the court.

Tolman *vs.* Leonard, 6 App. Cas. D. C., 224, 233.
Davis *vs.* Davis, 29 App. Cas. D. C., 258, 263.

But that would not be the case now, for "no provision is found looking to the repayment by the wife of any installments which had been collected from the husband, in the event of a retroactive reduction of the allowance." It would seem, therefore, that no power to retroactively modify was intended.

Sistare *vs.* Sistare, 218 U. S., 1, 23.
Lesh *vs.* Lesh, 21 App. Cas. D. C., 475, 485.

The Code provides for enforcement of decrees of the Supreme Court of the District of Columbia, and a decree for alimony, or maintenance, is no exception to this rule. It is subject to immediate execution, and is appealable.

Code D. C., section 113.
Lesh *vs.* Lesh, 21 App. Cas. D. C., 475, 484, 485.

The court's discretion as to the amount is, in the first instance, judicial, not arbitrary. The discretion as to *future installments* is equally so, and such installments will not be interfered with except for good cause shown.

The existence of such future cause will not be *presumed* or anticipated, any more than in a case for specific performance, which is within the sound discretion of the court; it will not be presumed, in determining the jurisdiction on appeal, that the value of the land involved will be lessened by change of ownership or unfavorable change of occupants of adjacent property.

Weber *vs.* Travelers' Ins. Co., 45 Fed., 657.
Langan *vs.* Langan, 86 California, 132, 133.
~~Conant *vs.* Conant, 10 California, 249, 254.~~
McCaddin *vs.* McCaddin, 116 Md., 567, 574.

> "As the appellant is now of an age [nearly seventy] which may make it more difficult each year for him to earn a living it may become necessary to make some modification of the decree as to the amount, but that must depend upon future circumstances and *cannot be anticipated by us.*"
>
> McCaddin *vs.* McCaddin, 116 Md., 567, 574.

But the court will take judicial notice of the increased cost of support of the little daughter of the parties, for the next six years, thus making the necessary amount in excess of the sum necessary for the jurisdiction of this court.

McCaddin *vs.* McCaddin, 116 Md., 567, 571.

It is not necessary that the amount in controversy should be expressly stated in the bill of complaint.

U. S. *vs.* Freight Association, 166 U. S., 290, 310.
Ex parte Bradstreet, 7 Pet., 634, 647.

The husband's ability is plainly stated (3, 4).

The wife testifies that a monthly allowance of one hundred dollars was necessary for the maintenance of herself and child (129).

The husband's offer to make a monthly allowance of one hundred dollars (184) is an admission of the proper monthly allowance.

Oliver *vs.* Alexander, 6 Pet., 143, 148-9.

The appellate jurisdiction of this court extends to *all cases* in which there is a final decree involving more than five thousand dollars.

The decree of the Court of Appeals, from which this appeal is taken, is undoubtedly a final decree, and its finality is not affected by the fact that leave is given to apply at the foot of the decree.

C. & P. Tel. Co. *vs.* Manning, 186 U. S., 238, 241.

French *vs.* Shoemaker, 12 Wall., 86, 98.

Notwithstanding the testimony, the appellant concedes that the decree of the Supreme Court of the District of Columbia (486), awarding to the wife for the support of herself and child the sum of seventy-five dollars a month, must be taken as the measure of the value of the matter in dispute.

Red River Cattle Co. *vs.* Needham, 137 U. S., 632, 635.

A claim of alimony, even *pendente lite*, may afford the basis of this court's jurisdiction on appeal.

De La Rama *vs.* De La Rama, 201 U. S., 303, 318.

It is submitted that the mere fact that the decree, following the statute, decrees that payment shall be made periodically, instead of *in solido*, does not affect the question of jurisdiction, as the amount of the possible, indeed *reasonably probable*, payments under the decree will exceed five thousand dollars.

B. & O. S. W. R. R. *vs.* U. S., 220 U. S., 94, 106.

This case illustrates the principle that in determining the amount involved, for the purpose of appeal, the scope of the inquiry may be, and generally is, broader in a suit in equity than in a case at law.

Stinson *vs.* Dousman, 20 How., 461, 466-7.
N. E. Mortgage Co. *vs.* Gay, 145 U. S., 123, 131-2.
Troy *vs.* Evans, 97 U. S., 1, 3.
Marshall *vs.* Holmes, 141 U. S., 463, 595.

If the decree of the Court of Appeals stands, its effect will be to destroy the appellant's right, not merely to one installment of alimony, but it would strike down her right to *any* and *all* maintenance, which, in view of the age and circumstances of the parties, is, *in all human probability*, in excess of the required amount. The vice of such an argument consists in assuming that specific installments are alone involved and covered by the decree of the court. The jurisdiction in this case is measured by the value of the right to be protected, and not by the value of some mere isolated element of that right. Cases seemingly at variance with this doctrine have been qualified and restricted by later decisions of this court.

Berryman *vs.* Whitman College, 222 U. S., 334, 346, 347, 348.

Statutes regulating appeals are remedial, and this court has always construed them liberally:

1. If a crime *might have been, a fortiori, might be*, punished with sufficient severity to make it an infamous crime, this court would take jurisdiction on appeal notwithstanding the fact that only a *nominal* fine was actually imposed.

The Paquete Habana, 175 U. S., 677, 682.

Luckman v Peyser, 169 U.S. 115, 129

2. In a case without precedent, and *"not free from difficulty,"* this court sustained its jurisdiction upon *"the rea-*

sonable inference" upon a mere *privilege,* which might never be exercised, that the amount involved was sufficient.

Harris *vs.* Barber, 129 U. S., 366, 369-70.

3. In a case involving a prosecution of an officer that *might* end in a sentence (*non constat* that he would be convicted) dismissing him from the service and [thus] depriving him of a salary, which in a certain number of years would exceed five thousand dollars, this court took jurisdiction on appeal.

Smith *vs.* Whitney, 116 U. S., 167, 173.

Alimony from time to time may be regarded as a portion of the salary of the husband, who may even be retired on half pay. This being so, such alimony is the subject of computation, and jurisdiction will be based thereon exactly as in the case of the entire salary.

Audubon *vs.* Shufeldt, 181 U. S., 575, 578.

It will be observed that in this case the Virginia divorce was only *a mensa et thoro* (24), therefore the parties are still husband and wife, without possibility of remarriage. Hence the installments may be valued like a simple annuity by reference to the mortality tables (Dunbar *vs.* Dunbar, 190 U. S., 340, 345).

Meaning of the Decree.

The decree is limited by the pleadings, which adhere to the requirements of the Code. The meaning of the decree, therefore, is that the husband shall pay to the wife at the least the sum of seventy-five dollars a month as long as the child may be dependent upon her for care and support.

Barnes *vs.* Chic., &c., Ry., 122 U. S., 1.

Pierce & Tenn. Coal, &c., R. R. Co., 173 U. S., 1, 9.

Ex parte Hart, 94 Calif., 254.

Carnig *vs.* Carr, 167 Mass., 544, 547.

McCaddin *vs.* McCaddin, 116 Md., 567, 574.

This court will take judicial notice of the usual tables, showing the expectancy of life of the parties and of the child.

Lincoln *vs.* Power, 151 U. S., 436, 441.

The wife was born in ~~1878~~ 1883 (112). The husband was born in 1866 (296). The child was born in 1907 (126). The affidavits filed by and on behalf of the wife (505, 506, 507) show the health of the parties and of the child to be good, and that in each case the expectancy of life is in excess of the requirements.

By the decree (486) the first payment of seventy-five dollars was to be made July 15, 1909, and a like sum on the fifteenth day of each month thereafter. At the end of five years and one month—that is to say, on the 15th day of July, 1914—the payments would amount to $4575. To this add the $500 for counsel fees and "the matter in dispute, exclusive of costs, will exceed the sum of five thousand dollars."

Less than two years of the time remains, thus bringing the case squarely within the requirements of Smith *vs.* Whitney, *supra*.

Upon the aforegoing considerations, it is submitted that this court has jurisdiction of this case upon appeal.

Deventer, against her (pp. 374, 377), and to exert a similar influence upon her cousin, Dr. Johnson Eliot (p. 382).

It was at the appellant's instance that Dr. Elliot's services were enlisted (p. 384).

If the doctor is in error as to the order of time in which he received any specific information, it is not to be wondered at.

Willett *vs.* Fister, 18 Wall., 91, 97.

It is difficult to determine upon what theory the appellee rests his defense. If he would have the court believe that his wife was overcome, at definite periods, by a weakness peculiar to her sex, her situation was one of peculiar sadness and the appellee's course towards his wife at the time, of all times, when she was in that condition which elicits the sympathy and tenderness of all normal people, would indicate that his love for his wife, if it ever existed, had turned to resentment and hate (p. 125).

It is true that in his Virginia bill "frankness constrains" (p. 23) him to admit that he had heard that she was pregnant, but as to this he could not affirm nor deny the truth, yet he had written his mother (p. 189) that his wife was in a "critical condition" ("pregnant (p. 389)").

Appellee is very fond of children (p. 336), yet matters so shaped themselves, by his procurement, that the mother was notified, when his child was two days old, that she was a divorced woman (p. 128).

Without means of realizing on her stock because of her husband's power in the premises, following the unavoidable delay in the determination as to the sufficiency of the Virginia divorce, there is small wonder that she wished to preserve her rights by a suit at law (p. 152), in the event that her efforts at relief in equity should fail. She was also delayed by her inability to sell her stock (p. 158) and by her own and her baby's illness (p. 159).

It is a serious matter that a teacher of one of our public schools should be charged with such gross misconduct. It is still more serious if he is guilty of such misconduct;

but the only thing the appellant is concerned with here is to obtain support for herself and her child.

If the appellee, occupying the conspicuous public position that he did (and still does), think so little of his reputation as to obtain extended leave of absence from this jurisdiction and to return with a Scotch verdict, obtained after an *ex parte* hearing, and sought to be maintained upon a sheer technicality, it can hardly be expected that this court will be very jealous of a reputation for which the appellant himself had so little regard.

The testimony of Dr. Keene (242) tends to show that the appellant was a great sufferer at certain periods. In such case the appellee's conduct towards her is all the more reprehensible.

A vast amount of the testimony produced by the appellee can have no purpose other than to prejudice the court against the appellant.

Under the terms "disposition" and "temperament" a thinly veiled attack is made upon her character.

The appellee's self-confessed conduct towards a frail and invalid wife may not be a bar to his Virginia decree, but it is a *fact*, nevertheless, which this court will consider upon the merits of the case.

Crosby *vs.* Buchanan, 23 Wall., 420, 454.

The witness Fairbrother (205, 206, 207) having died since his testimony was given his testimony will not be commented on by counsel.

This class of testimony is met by the testimony of:

Mrs. Van Deventer (p. 373);

Mr. Ralph Given (p. 378);

Mr. W. W. Boarman (p. 380);

Dr. Johnson Eliot (p. 381);

Mr. Harvey Given (p. 451);

Miss Mary J. Kerr, the appellant's old teacher and friend (p. 457);

Mrs. Ralph Given (p. 459);
Mrs. Given's sister, Miss McCauley (p. 468);

all of whom have a good word to say for Mrs. Thompson, most of them connected with her by blood or marriage and proud of that connection.

There is no motive of hostility suggested on the part of any witness against the appellee.

Mrs. Thompson could not sell her stock, and consequently could not even take her testimony. The meagre proceeds of the sale as eventually made barely sufficed to meet the preliminary demands of her suit.

There is strenuous effort on the part of counsel to discredit Mr. Gerdes by showing that he was a friend of Mrs. Thompson's father (p. 31), and yet the appellee testifies that Mrs. Thompson's father "would not trust old Gerdes for five cents" (p. 331).

There is not a particle of testimony brought to impeach:
Mr. Gerdes (p. 26);
Mrs. Gerdes (p. 51);
Mrs. Hood (p. 68);
Mr. Hood (p. 81);
Miss Hutcheson (p. 87);

who all testify to a condition of affairs that makes us wonder that this case ever found its way into a court of equity instead of the criminal court, and there on a trial for murder.

If the aforegoing testimony is believed this court will not spend much time upon the remainder.

If the testimony is believed, and it is inconceivable that it can be doubted by the court, it can not be deemed an unnatural thing for the afflicted wife to take her final departure.

On the 13th of the following June, upon the existence of the circumstances as narrated even by the appellee at page 338 of the record, it is respectfully submitted that the appellant was justified in leaving the appellee and the only wonder is that she was able to endure existence with him as

long as she did, and even if it should be deemed that she was not wholly free from blame, that would not justify the husband's conduct towards her.

Shaw *vs.* Shaw, 2 App. Cas. D. C., 204.

The Virginia decree was not final within the meaning of the full faith and credit clause of the Constitution.

The Virginia Code provides that any defendant not served with process, under section 3232, may within three years from the date of a decree petition to have the case reheard, and may plead or answer and have any injustice in the proceeding corrected.

Virginia Code, sect. 3233.

The Callahan service (19) was on September 21, 1907, commanding the defendant to appear on the third Monday in September, 1907. The third Monday in September, 1907, was September 16 and was already past. The service was therefore void and the defendant was not served with process under the provisions of section 3232 of the Code.

Raub *vs.* Otterback, 89 Va., 645.

This left the decree subject to be set aside in the discretion of the court.

While the appellant's rights cannot be made to depend upon this element of favor or discretion, it is sufficient to prevent the decree being final within the meaning of the full faith and credit clause of the Constitution.

Cheely *vs.* Clayton, 110 U. S., 701, 708.
Roller *vs.* Holly, 176 U. S., 398, 409.
Lynde *vs.* Lynde, 181 U. S., 183, 187.

The Decree is Void in Virginia.

The disclosures in the record of the Virginia proceedings (Exhibit A) (16), made a part of the appellee's answer to the bill of complaint in this case (12), control the recitals

in the decree of the Virginia court (24) as to personal service and publication.

Cheely *vs.* Clayton, 110 U. S., 701, 708.

The Jurisdictional Affidavit in the Virginia Case.

The affidavit "to be used as basis for an order of publication" (19), being made upon *information and belief* (20), is *not sufficient as a basis for an order of publication;* such publication was therefore unauthorized and all proceedings based upon it null and void.

The sufficiency of the affidavit is to be determined by the law of Virginia, and if the publication in the particular case be unauthorized no principle is perceived upon which it can be regarded as constructive notice.

Hollingsworth *vs.* Barbour, 4 Pet., 466, 474.

The sole authority for notice by publication is to be found in the Virginia Code, section 3230. *On what affidavit order of publication may be entered; when and by whom entered.*

ON AFFIDAVIT THAT A DEFENDANT IS NOT A RESIDENT OF THIS STATE * * * AN ORDER OF PUBLICATION MAY BE ENTERED AGAINST SUCH DEFENDANT.

Virginia Code, sect. 3230.

Of course, if the statements contained in the affidavit are *equivalent* to the statement that she is *not a resident of the* State, they would be sufficient, but a statement made upon information and belief cannot be equivalent to a direct statement unless the facts upon which the information and belief are based are set forth, so that the court may determine their reasonableness and sufficiency.

Clowser *vs.* Hall, 80 Va., 864.

Rice *vs.* Ames, 180 U. S., 371, 374.

Holmes v. Holmes, 15 Neb. 615. 616

Fulton v Levy, 21 Neb. 478. 482

The Virginia Code provides that * * * where an affidavit is required in support of any *pleading*, it shall be sufficient if the affiant swear that he believes it to be true.

Virginia Code, sect. 3282.

We have already seen (*Clowser vs. Hall, supra*) that such an affidavit will not support an attachment. That case brought about the amendment of the law with respect to the affidavit as a basis for an *attachment*, which may *now* be made upon information and belief, but left unchanged the requirement in a case like the one now before the court.

Virginia Code, sects. 2959, 3230.

See also:

Form of Affidavit for Attachment, Code, p. (1571).

Form of Order of Publication, Code, p. (1702).

An order of publication is not a *pleading*, it is *process;* the pleadings are made by the *parties;* the order of publication is issued by the clerk.

Section 32 of the judiciary act of 1789, ch. 20, now sect. 954, R. S. U. S., uses "process" as distinguished from "pleading."

See also:

Loeb *vs.* Columbia, &c., Trustees, 179 U. S., 472, 482.

A *motion*, although reduced to writing, is not a *pleading*.

Brownfield *vs.* South Carolina, 189 U. S., 426, 428.

An "*application for witnesses*" (affidavit) is not a pleading.

Tucker *vs.* U. S., 151 U. S., 164, 169.

Process by means of publication is purely statutory and not according to the course of the common law, and it can only be *instituted* in the manner required by the statute.

Cooper *vs.* Newell, 173 U. S., 555, 572.

If the affidavit had been as to the defendant's *domicile*, which may present a mixed question of *law* and fact, there would be some basis for the contention that an affidavit upon information and belief would be sufficient, but as to the mere *fact* of *residence* the affidavit must be *positive*.

Jackson *vs.* Webster, 6 Munf. (Va.), 462, 464.
Clowser *vs.* Hall, 80 Va., 864.

The Court of Appeals, in its opinion (501) in saying that the Virginia court had jurisdiction of the *subject-matter* of the suit, it is respectfully submitted, falls into the not uncommon error of confusing suits for divorce with those *in rem* proceedings, in which "the *thing* had been first SEIZED into the custody of the court."

In one of the leading cases in this court on the subject it is expressly recognized "that there are cases, when the judgment is to have an effect on *personal* rights, *as in divorce suits*," which are not to be assimilated too closely to those cases in which the *jurisdiction* is *acquired* by *seizure* of the property involved.

Cooper *vs.* Reynolds, 10 Wall., 308, 319.
Hamilton *vs.* Brown, 161 U. S., 256, 274.
Haddock *vs.* Haddock, 201 U. S., 562, 576.

Land may be drawn within the jurisdiction of the court by merely bringing a suit, but the jurisdictional necessity for the actual custody of *chattels* has been consistently applied, and for the same reason that a vested remainder in chattels was not subject to sale by common-law execution, as the *fi. fa.*, in either case requires actual custody and delivery of the goods.

Dargan *vs.* Richardson, Dud. (S. C.), 62.
Allen *vs.* Scurry, 1 Yerg. (Tenn.), 36.
Lockwood *vs.* Nye, 2 Swan (Tenn.), 515.

force
The ~~face~~ of the words "on affidavit," as used in the Virginia statute cannot be less than that of the word "there-

upon," construed as *jurisdictional* when applied to special statutory powers.

In re Pensacola Lumber Co., 8 Benedict, 171, 174.

The Personal Service.

The Court of Appeals (503) commends the practice of giving personal notice in addition to publication. This may be correct, but it is hardly applicable to the service in question.

The publication "notified" the plaintiff's pregnant wife (*and he knew she was pregnant, for he had so informed his mother* (189)) to appear in the Virginia court "within 15 days after due publication," and do what was "necessary to protect her interests."

This "notice" was published in the *Mirror* (20) for four weeks from September 5, 1907, some time subsequent to the time for her to appear in accordance with the terms of the "actual notice" which "on the same day" (19) the husband initiated. If he could not be expected to protect his wife's interests, surely she was justified in assuming that he would hardly dare violate those interests by sending her a misleading notice to protect them.

The courts indulge presumptions when the record is *silent* which are overcome when different evidence is disclosed or averments made; then why should not a defendant be permitted by the court to assume that there was no other time designated, and to rely upon an "actual notice" in lieu of the constructive (presumed) notice by publication?

Galpin *vs.* Page, 18 Wall., 350, 366.
Cheely *vs.* Clayton, 110 U. S., 701, 708.
Hays *vs.* U. S., 175 U. S., 248, 261.
Blackburn *vs.* Crawford, 3 Wall., 175, 194.

The appellant's domicile was not in Virginia. She was therefore not bound by the Virginia decree.

The appellee, in the first instance, set up the Virginia divorce by way of plea (17). The plea was duly overruled (25). The order overruling the plea not being appealed from, the plea dropped out of the case. He thereupon filed an answer, setting up therein the record of the Virginia proceedings in which the divorce was rendered and demanding full faith and credit for the decree of divorce (13). It thus became necessary for him to prove the divorce like any other fact.

Humes *vs.* Scruggs, 94 U. S., 22, 24.
Clements *vs.* Moore, 6 Wall., 299, 315.

The appellee made no objection to the testimony of any witness except that in the case of the complainant herself, he made the specific objection that the parties were still husband and wife, and that it was "incompetent for a wife to testify in such proceedings" (112).

Although the objection is obviously untenable, it emphasizes the waiver of all other objections, including that of estoppel by the Virginia decree. A person may waive a right which he has under the Constitution of the United States, and when the testimony was once in, without objection, it was too late to strike it out by offering the Virginia divorce

Pierce *vs.* Somerset Ry., 171 U. S., 641, 648.
Benson *vs.* U. S., 146 U. S., 325, 332.

By the testimony, thus admitted, it is disclosed that at the final parting, which occurred in the District of Columbia and within the jurisdiction of its courts, the husband put his wife away and sent her back to "her people," thus consenting to, indeed compelling, the assumption by her of domicile in this District. Under these circumstances he will not be permitted to flee to a place of constructive domicile, procure a decree of divorce upon constructive service, and avail himself

of it in the courts of a jurisdiction that is really his own home, and the only place on earth that his wife is permitted, and that by his procurement, to call by that name.

Haddock *vs.* Haddock, 201 U. S., 562, 583, 589, 599, 606.

Respectfully submitted,

WM. M. LEWIN.
Attorney for the Appellant.

[18772]

PUBLICATION.

Every order of publication shall give the abbreviated style of the suit, state briefly its object, and require the defendants against whom it is entered, or the unknown parties, to appear within fifteen days after due publication thereof and do what is necessary to protect their interests. It shall be published once a week for four successive weeks in such newspaper as the court may prescribe, or, if none be so prescribed, as the clerk may direct, and shall be posted by the clerk, at the front door of the courthouse of the county or corporation wherein the court is held, on or before the next succeeding rule day after it is entered; and the clerk shall file a certificate of the fact in the papers of the case; but the court, or the judge thereof in vacation, may, in any case, if the court or judge deem it proper, dispense with such publication in a newspaper.

Va. Code, 1904, Sec. 3231.

Section of Virginia Code Construed in 80 *Va.,* 864.

When any suit is instituted, etc., * * * ON AFFIDAVIT THAT THE DEFENDANT * * * IS NOT A RESIDENT OF THIS STATE * * * the plaintiff may forthwith sue out of the clerk's office an attachment, etc.

Va. Code, 1873, ch. 148, sec. 1.

(Amended, permitting non-residence to be stated "to the best of affiant's belief."—Va. Code, 1904, sec. 2959.)

Section Under Which Publication Was Had in This Case.

ON AFFIDAVIT THAT A DEFENDANT IS NOT A RESIDENT OF THIS STATE * * * an order of publication may be entered, etc.

Va. Code, 1904, sec. 3230.

Personal Service.

* * * Personal service of the summons * * * may be made on a non-resident defendant out of this State, which service shall have the same effect, and no other, as an order of publication duly executed.

Va. Code, 1904, supplement, 1910, sec. 3232.

Decree May Be Set Aside.

Any * * * defendant who was not served with process and did not appear in the case before the date of such * * * decree * * * may, within three years from that date * * * petition to have the case reheard, and may plead or answer, and have any injustice in the proceedings corrected.

Va. Code, 1904, sec. 3233.

Office Supreme Court, U. S.
FILED.
NOV 4 1912
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 45.

JESSIE E. THOMPSON, APPELLANT,

vs.

CHARLES N. THOMPSON.

PETITION FOR CERTIORARI.

WM. M. LEWIN,
Attorney for the Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912.

No. 45.

JESSIE E. THOMPSON, APPELLANT,

vs.

CHARLES N. THOMPSON.

To the Honorable the Supreme Court of the United States:

The petition of Jessie E. Thompson, the subscriber, respectfully represents:

1. That she is the appellant in the above-entitled case.

2. That her cause of action is meritorious.

3. That she is advised that there is doubt of this court's jurisdiction of said case upon appeal.

In view of such doubt, and the premises further considered, the petitioner prays as follows:

1. That the writ of certiorari may be duly granted, if it shall be determined that this court is without jurisdiction upon such an appeal.

And for such other and further relief as may be proper.

JESSIE E. THOMPSON.

WM. M. LEWIN,
Attorney for the Petitioner.

DISTRICT OF COLUMBIA, *To wit:*

I, Jessie E. Thompson, on oath say that I have read the foregoing petition by me subscribed and know the contents thereof; that the matters and things therein stated of my own knowledge are true and those stated upon information and belief I believe to be true.

JESSIE E. THOMPSON.

Subscribed and sworn to before me, in said District, this 28th day of October, A. D. 1912.

RUTLEDGE WILLSON,
Notary Public, D. C.

APPELLEE'S

BRIEF

12

Office Supreme Court, U. S.
FILED.
OCT 30 1912
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States

OCTOBER TERM, 1912.

No. 45.

JESSIE E. THOMPSON, *Appellant*,

vs.

CHARLES N. THOMPSON.

BRIEF ON BEHALF OF APPELLEE.

A. E. L. LECKIE,
JOSEPH W. COX,
JOHN A. KRATZ, JR.,
Attorneys for Appellee.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1912.

No. 45.

JESSIE E. THOMPSON, *Appellant*,

vs.

CHARLES N. THOMPSON.

BRIEF ON BEHALF OF APPELLEE.

STATEMENT.

The appeal in this cause is from a judgment of the Court of Appeals of the District of Columbia, reversing a decree of the Supreme Court of the District of Columbia in favor of the appellant upon a suit for maintenance brought by her against her husband the appellee (R., p. 508).

The parties were married on the seventh day of December, 1905, in the District of Columbia, and with the excep-

tion of some short periods of separation, lived together as husband and wife until the 13th day of June, 1907 (R., p. 2).

The husband was born in Loudoun County, Virginia, which he still claims as his domicil (R., p., 5, 21).

The testimony shows that he is a duly registered and qualified voter of that county; that he owns property there; that he has served on juries there; that he has always spent his time there when he was not actively employed in his school work, and that he frequently returned in the course of school terms to look after his business in Virginia.

He is a teacher by profession, and for several years past has been Principal of the Jefferson School in the city of Washington, District of Columbia, where he has lived during the school terms. (Complainant's Bill, R., p. 2; Defendant's answer, R., pp. 5 and 6; also R., p. 21.)

On the 29th day of July, 1907, the appellant filed her bill for maintenance against the appellee. In her said bill she charged the appellee with treating her with brutal and almost unexampled cruelty, beginning the day after their marriage and continuing almost uninterruptedly while they were living together, with increasing frequency and violence until the 13th day of June, 1907, when she was compelled to leave him and is afraid to return to him (see bill, R., pp. 2 and 3).

On the 3d day of September, 1907, the husband brought a suit in the Circuit Court of Loudoun County, Virginia, for a divorce *a mensa et thoro*, in the course of which, on the 16th day of September, he filed a bill in said Court charging the wife with having, on the 13th day of June, 1907, willfully abandoned his bed and board and deserted him without any cause whatsoever, and nothwithstanding his repeated entreaties and endeavors to induce her to return, she had refused to do so. Publication having been had, and a personal notice of the suit given to the appellant (R., p.

19), the Virginia Court proceeded, after the taking of testimony, to enter a decree in favor of the appellee, granting him a divorce *a mensa et thoro* and divesting each of the parties of all marital rights in the property of the other (R., p. 24).

On return of the husband to the District of Columbia in the fall of 1907, he was served with process in the suit filed by the wife here, and thereupon filed his plea in bar, setting up the Virginia decree and the proceedings upon which it was rendered as a bar to the appellant's suit in this District (R., pp. 17-24).

Upon the hearing of the plea, it was overruled by the Supreme Court of the District, and he was allowed 15 days in which to answer the bill (R., p. 25).

Thereupon, the appellee answered said bill and in his answer set up that his domicil as well as the matrimonial domicil of the parties was in Loudoun County, Virginia. He denied the charges of cruelty made against him; asserted that the charges brought against him were false; that he had done all he reasonably could to supply her needs; that when she had deserted him without cause on various occasions, he had gone for her and besought her to return, being compelled on one of said occasions to turn over to her $600.00 of dividend-bearing stock in order to get her to do so. He denied that he has made any illegal or unnatural demands upon her, or that he had ever cruelly treated her. He alleged that during the time they lived together she greatly neglected her household duties so that it was necssary for him to prepare his own as well as her meals, and to do practically all of the household work; that after she had deserted him he besought her to return, and that in order to avoid the notoriety of any kind of litigation, he had offered and was willing to pay her $60.00 a month for her support, but she threatened and declared that she would file suit against him unless he paid her $100.00 a month;

that thereupon she filed suit against him in which she maliciously and falsely charged the matters contained in her bill; that she further instituted a suit in damages against him for $70,000 (Thompson *vs.* Thompson, 218 U. S. 611); that she went to the members of the Board of Education, District of Columbia, by whom he was employed, and attempted to so prejudice them against him that he would be compelled to resign or be dismissed as Principal of one of the public schools. (Her mother instituted a further suit against him for $20,000, (R., p. 159). That when he realized the impossibility of a reconcilliation, or of meeting the extravagant demands she made upon him, and that she was bent upon ruining him, he filed the suit for separation at their matrimonial domicil, in which the decree was rendered, upon which he relies as a bar to this proceeding.

After the taking of testimony upon the bill and answer, in the maintenance proceeding in the District, the Court entered a decree in favor of the appellant, awarding her the care and custody of the child, which was born on November 24, 1907, requiring appellee to pay the sum of $75.00 per month as maintenance, and the sum of $500.00 as counsel fees, from which decree an appeal was taken to the Court of Appeals of the District of Columbia. In that Court the husband contended that the court erred—

1. In overruling the plea setting up the Virginia decree as a bar to the action for maintenance.

2. In holding that the wife is entitled to maintenance, notwithstanding the decree of the Virginia Court.

3. In holding, upon the merits of the case as disclosed by the testimony, that the wife is entitled to maintenance. (R. p. 496.)

The Court of Appeals on April 5, 1910, rendered its decision, reversing the decree of the Supreme Court of the District of Columbia, and remanded the cause to said Court with directions to enter an order vacating the decree and

dismissing the bill. (R., p. 503). The wife then moved for an appeal to this Court, which was denied by the Court of Appeals, (R., p. 508), after which an appeal to this Court was allowed by the Chief Justice. (R., p. 509).

I.

This Court is Without Jurisdiction.

Before discussing the questions raised by the Appellant's Assignments of Error in this Court, we invite the Court's attention to its lack of jurisdiction to hear this cause. The appeal is based upon Section 8 of the Act of February 9, 1893, entitled "An Act to Establish a Court of Appeals for the District of Columbia, and for other Purposes," which reads as follows:

> "Sec. 8. That any final judgment or decree of the said Court of Appeals may be re-examined and affirmed, reversed, or modified by the Supreme Court of the United States, upon writ of error or appeal, in all causes in which the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars, in the same manner and under the same regulations as heretofore provided for in cases of writs of error on judgment or appeals from decrees rendered in the Supreme Court of the district of Columbia; and also in cases, without regard to the sum or value of the matter in dispute, wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of or an authority exercised under the United States." (27 Stat. 436.)

It has long been established by this Court that in order to confer jurisdiction under this statute, the matter in dispute must be money, or some right the value of which can be estimated in money. Furthermore, the value must be *actual* value—not a value based upon speculation on possibilities.

Barry v. *Mercein*, 5 How. 103.
Kurtz v. *Moffitt*, 115 U. S. 487.
Durham v. *Seymour*, 161 U. S. 235.
Huntington v. *Saunders*, 163 U. S. 319.
Foster's Fed. Practice, Vol. 1, 4th Ed., p. 87.

In *Kurtz vs. Moffitt, supra*, Mr. Justice Gray, in construing the act of March 3, 1875, (18 Stat. 470,) quoted with approval the following from the opinion of Chief Justice Taney in *Barry* v. *Mercerin, supra*, (p. 495):

> "In order, therefore, to give us appellate power under (the 22nd section of the Judiciary Act of 1789,) the matter in dispute must be money, or some right, the value of which in money can be estimated and ascertained." "The words of the Act of Congress are plain and unambiguous. They give the right of revision in those cases only where the rights of property are concerned, and where the matter in dispute has a known and certain value, which can be proved and calculated, in the ordinary mode of a business transaction. There are no words in the law, which by any just interpretation can be held to extend the appellate jurisdiction beyond those limits, and authorize us to take cognizance of cases to which no test of money can be applied."

Tested by the settled rule above stated, we submit that the Court is without jurisdiction. The decree of the Supreme Court of the District of Columbia, awarding maintenance and counsel fees in its material part is as follows:

> "That the defendant, Charles N. Thompson, pay to the said complainant for the maintenance of herself and the said child the sum of Seventy-five Dollars a month, and forthwith the further sum of Five Hundred Dollars for counsel fees in this cause; and further that the said defendant pay the costs of this suit." (R., p. 486.)

It is apparent on the face of the decree that the amount involved does not exceed $5,000.00, since it simply provides that the appellee shall pay to the appellant $75.00 a month and $500.00 for counsel fees. But the appellant seeks by affidavits to show that the expectancy of the appellee's life is twenty-five years, (R., p. 506), and that by July 15, 1914, the monthly payments would amount to $4,575.00, which, together with the $500.00 attorney's fee, would make the matter in dispute exceed $5,000.00 (Appellant's brief, p. 11). This conclusion of counsel is arrived at, of course, by speculating on possibilities, which this Court has always heretofore refused to indulge in. That either the appellee or appellant will live long enough to cause the monthly payments to aggregate more than $5,000.00 is pure speculation. Furthermore, the decree in this case may be modified or rendered inoperative, for, as stated by this Court in *Audubon vs. Schufeldt*, 181 U. S., 575, 578, quoting with approval from 6 App. D. C. 233:

> "The allowance of alimony is not in the nature of an absolute debt. It is not unconditional and unchangeable. It may be changed in amount, even when in arrears, upon good cause shown to the Court having jurisdiction."

The record shows that the appellant's mother, who is of mature years, is the owner, for life, of a large estate, one-third of which upon the mother's death may therefore any day pass into her hands (R., p. 148). In that event the Court might see fit to modify the decree or to change it altogether, and especially would this be so if the appellee should in anyway lose his ability to meet the terms of the decree. Again, the decree might be modified by the Court because of the changed condition of the parties, who may remarry, the husband's divorce *a mensa et thoro* having ripened into an absolute divorce under the Virginia

law (Sec. 2266 Code of Va.). Still again, the appellant might get married again; and the death of either party would, of course, extinguish the claim. All of these contingencies render it uncertain that the matter in dispute will ever exceed $5,000.00 and make the jurisdictional sum depend upon speculation or possibilities. It is at once, therefore, apparent that the matter here in dispute does not have "any known and certain value" in excess of $5,000.00. And since this Court will neither speculate on the life of the appellee nor presume that the relations of the parties will not change, it has no certain basis upon which to estimate that the matter in dispute will ever exceed $5,000.00.

A case exactly in point is that of *Miles* v. *Miles*, 200 Ill., 524. This case involved the jurisdiction of the Supreme Court of Illinois to review on writ of error a suit for separate maintenance, in which the decree awarded the complainant $30.00 per month alimony and the right to occupy a dwelling with a rental value of $35.00 per month and to pay a solicitor's fee of $200.00. The Court dismissed the writ for want of jurisdiction under a statute of the State of Illinois which gave the right of appeal in all "cases where the sum or value in controversy exceeds $1,000, exclusive of costs." The facts of that case are so like those in the case at bar that we take the liberty of quoting at length from that decision:

> "By the terms of the decree upon the cross-bill, it was ordered that the defendant in error should be allowed, and that plaintiff in error should pay to her, the sum of $30.00 a month in advance, payment to commence on May 1, 1901; and, in addition to said payment of $30.00 a month, defendant in error was to have the right to occupy, rent free, a certain house for a dwelling or home. The Court found that the rental value of the house was $35.00 a month, so that the

award of alimony to the defendant in error was not more than $65.00 per month altogether. The decree upon the cross-bill also ordered, that plaintiff in error should pay to defendant in error, in full of fees for her solicitor up to the time of the entry of the decree, the sum of $200.00, $100.00 thereof on May 1, 1901, and $50.00 per month on the first day of each month thereafter, until the total sum of $200.00 should be paid.

"It is apparent from the foregoing statement, that the amount involved in this suit is not necessarily as large as $1,000.00. Accordingly, the present writ of error must be dismissed for want of jurisdiction in this Court.

"In *Umlauf vs. Umlauf*, 103 Ill. 651, it was held that the right of an appeal from, or writ of error to, the Appellate Court is not given by statute in case of a bill by a married woman for a separate maintenance, where the original decree is for a less amount than $1,000.00, as, where it requires the husband to pay $60.00 a month to the wife for the support of herself and child; and, in the latter case, it was said (p. 656): 'There is no certainty that the present relations between the parties will exist any considerable length of time, and we are aware of no principle that would warrant a presumption the one way or the other upon that subject. A resumption of the conjugal relations, or the death of either party, would operate as an extinguishment of the claim. The fact that the claim might in the course of time,—assuming their present relations to continue,—amount to as much as $1,000.00, we do not regard as sufficient to give this court jurisdicition. Before the right to appeal attaches in a case like this, it must clearly appear from the record there is involved in the controversy, independent of all contingencies, the amount of $1,000.00, exclusive of costs. Testing the present case by this rule, it is clear the appeal does not lie, and will therefore have to be dismissed.' The case of *Umlauf* v. *Umlauf*, *supra*, was followed and endorsed in the subsequent case of *Seelye* v. *Seelye*, 143 Ill. 264,

> which was also a proceeding under the statute to recover separate maintenance and where it was held, upon the authority of the *Umlauf case*, that the amount to be decreed was less than $1,000.00.
>
> "For the reasons above stated, the present writ of error is dismissed."

The appellant, however, relies upon the case of *Smith* v. *Whitney*, 116 U. S. 167, as authority for this Court's jurisdiction in the case at bar. We believe that a consideration of that case will show that the decision therein was based upon an essentially different state of facts. In that case it appeared that Smith, a Pay-Inspector in the Navy, held by appointment of the President and confirmation of the Senate, the office of "Chief of the Bureau of Provisions and Clothing and Pay-Master General in the Department of the Navy," for a term of four years. The Court said:

> "The matter in dispute is whether the petitioner is subject to a prosecution which may end in a sentence dismissing him from the Service, and depriving him of a salary, as Pay-Master General, during the residue of his term as such, and as Pay-Inspector afterwards, which in less than two years would exceed the sum of $5,000.00."

The Court then held that as the—

> "salary during the term of the office would exceed the sum named in the Statute defining its appellate jurisdiction, it had jurisdiction of the case."

It will at once been seen that in the Smith case the Court did not find it necessary to indulge in speculation in order to determine whether or not the value of the matter in dispute equalled the jurisdictional amount, for Smith was the occupant of an office for a definite period of four years to which was attached a definite salary. On the other hand, in

the case at bar, there is no certain period during which the monthly payments for maintenance are to be made, for, as we have already pointed out, the relations of the parties may become entirely changed at any time.

None of the other cases referred to by counsel for appellant in his brief on the question of jurisdiction seem to have any particular relation to the subject, but insofar as they do, they support our contention, and we do not think it necessary to refer to them further.

In view of the foregoing, it is respectfully submitted that the appeal should be dismissed.

II.

Three questions are raised by the specifications of error, discussed in appellant's brief and considered in the opinion of the Court of Appeals:

1. *Is the decree of the Virginia Court, if valid in Virginia, binding upon the parties in the District of Columbia and a bar to the wife's claim for maintenance?*

This question seems to be answered by the decision in the case of *Atherton* v. *Atherton*, 181 U. S., 155, the facts of which are in all respects similar to the facts in the case at bar.

In that case, a divorce was obtained by the husband in Louisville, Kentucky, upon constructive service, on the ground of unlawful desertion by the wife. In a suit brought against him for divorce on the grounds of cruelty, in the courts of New York, in which State she had taken up her residence, the husband pleaded as a bar to her action the decree granted in Kentucky. The Supreme Court of the United States, reversing the Court of Appeals of New York, held that the decree of the Kentucky Court bound the wife

as fully as if she had been served or had appeared in Kentucky; that it established beyond contradiction that she had abandoned her husband precluded her from asserting that she left him on account of his cruel treatment and was enforceable in the State of New York under the full faith and credit clause. The court said (p. 162):

> "The purpose and effect of a decree of divorce from the bond of matrimony by a court of competent jurisdiction are to change the existing status or domestic relation of husband and wife, and to free them both from the bond. The marriage tie when thus severed as to one party, ceases to bind either. A husband without a wife, or a wife without a husband is unknown to the law."

And—

> "The divorce in Kentucky was by the court of the State which had always been the undoubted domicil of the husband, and which was the only matrimonial domicil of the husband and wife." (p. 171.)

The case of *Haddock vs. Haddock*, 201 U. S., 562, is relied upon by the appellant as supporting a contrary view. The Haddock case, however, while holding that mere domicil within a State of one party to the marriage does not give the Courts of that State jurisdiction to render a decree enforcible in other States by virtue of the full faith and credit clause against a non-resident who did not appear and was only constructively served, expressly recognizes and declares as a proposition "irrevocably established" by the Atherton case that—

> "Where the domicil of a husband is in a particular State and that State is also the domicil of matrimony, the Courts of such State having jurisdiction over the husband may, in virtue of the duty of the wife to be

> at the matrimonial domicil, * * * have power to render a judgment dissolving the marriage which will be binding upon both parties, and will be entitled to recognition in all other States by virtue of the full faith and credit clause."

It would seem to appear from these decisions that if a suit is brought at the matrimonial domicil of a husband whose domicil coincides with the domicil of matrimony, the decree obtained is, by virtue of the Constitution, entitled to full faith and credit; but that if the husband removes from the matrimonial domicil and the wife remains, a decree obtained by the husband in his new place of abode is not entitled to full faith and credit.

The decision in the Haddock case expressly disclaims questioning the power of any State to enforce within its own borders the decrees of its courts or to intimate any doubt as to the power of other States to give decrees rendered elsewhere such efficacy as they may be entitled to in view of the public policy of such other States.

In the case at bar, Virginia is the legal domicil of the husband. He was born and reared in Loudoun County, and there is nothing to show that he ever lost the domicil of his birth. The wife's bill does not even allege any other domicil, but merely that she "is not definitely informed as to the defendant's residence, but for several years last past he has lived in said District substantially throughout each year, with the exception of the summer vacation of the District Public Schools, in one of which the defendant is teacher." (R., p. 2.) It does appear that he has always claimed Virginia as his home and treated it as his legal residence; that he is a registered voter of Loudoun County (R., p. 247), and that he served on juries there (R., p. 199); that he owned property there and returned there every summer to spend his vacation as soon as school work

in Washington closed, and went back frequently in the course of the school year to look after his interests there. (R., p. 474.)

In the case of *Downs vs. Downs*, 23 App. D. C., 381, it was held that in suits relating to right of suffrage, divorce, etc., the term "residence" is used in the sense of legal residence, that is, the place or domicil of permanent abode as distinguished from the place of temporary residence, and that the fact that Downs had gone to Maryland for the purpose of exercising the electoral franchise and had been registered there as a voter showed that he had satisfied the Maryland authorities that his residence there was in good faith with the intention of remaining and making it his fixed and permanent home; that he could not claim to be a resident of the State of Maryland for the purpose of voting and a resident of the District of Columbia for the purpose of obtaining a divorce.

If it be true that the husband was a legal resident of Virginia, he could not have procured a divorce *a mensa et thoro* from his wife in the District of Columbia. The fact that his wife might have come to the District did not authorize him to seek in the courts of the District the relief to which he claimed to be entitled.

Section 971 of the *Code* provides:

> "No decree of nullity of marriage or divorce shall be rendered in favor of any one not a resident of the District of Columbia."

Speaking of this section in the Downs case, the Court of Appeals said:

> "By this it is evidently intended and required that residence for the purpose of divorce should in all cases be in good faith, and such residence as the laws of Maryland prescribe as a prerequisite for voting—that

> is, residence with the intention of remaining in the District and making it the party's fixed and permanent home."

The husband could have but one domicil or legal residence, and if Virginia was such domicil it was also the matrimonial domicil of the parties, because the domicil of the wife is the domicil of the husband so long as they live together as husband and wife. The conditions under which the husband proceeded are therefore identical with the conditions which this Court has held gave the court of Kentucky jurisidiction to render in the Atherton case a valid and binding decree which was entitled to full faith and credit in the courts of all the States.

From the foregoing it follows that to determine what effect the Virginia decree has in the District of Columbia, it is only necessary to ascertain the effect of said decree in Virginia.

The Virginia decree provided:

> "That the complainant, Charles N. Thompson, be and hereby is granted a divorce *a mensa et thoro* from the said defendant, Jesse E. Thompson; and that each of them be and he and she are divested of all marital rights in the other's property." (R., p. 25.)

The general effect of a limited divorce is thus stated in 14 *Cyc.*, 729:

> "A limited divorce substitutes for the common law obligation the terms of the judgment which is thereafter the measure of the rights and duties of the parties."

The provisions of the Virginia code affecting decrees for divorce *a mensa et thoro* are as follows:

"Sec. 2263. Upon decreeing the dissolution of a marriage, and also upon decreeing a divorce, whether from the bond of matrimony or from bed and board, the court may make such further decree as it shall deem expedient concerning the estate and maintenance of the parties, or either of them, and the care, custody, and maintenance, of their minor children, and may determine with which of the parents the children, or any of them, shall remain; and the court may, from time to time afterwards, on petition of either of the parents, revise and alter such decree concerning the care, custody, and maintenance of the children, and make a new decree concerning the same, as the circumstances of the parents and the benefit of the children may require.

"Sec. 2264. In granting a divorce from bed and board, the court may decree that the parties be perpetually separated and protected in their persons and property. Such decree shall operate upon property thereafter acquired, and upon the personal rights and legal capacities of the parties, as a decree for a divorce from the bond of matrimony, except that neither party shall marry again during the life of the other.

"Sec. 2266. * * * when three years shall have elapsed after the entering of a decree for a divorce from bed and board, upon any other ground than that of desertion, and in any case where desertion is the ground for divorce when three years shall have elapsed from the time of such desertion, upon application of the party injured, and upon the production of satisfactory evidence, whether taken theretofore or in support of such application, the court may merge such decree for divorce from bed and board into a decree for a divorce from the bonds of matrimony; provided, the court shall be of opinion, from the evidence taken in the suit and in support of the said application, that no reconciliation has taken place, or is probable, and that a separation has continued without interruption since the granting of such divorce."

Under the sections quoted, it seems clear that the decree rendered would preclude the right of the wife to alimony so long as it remains in force.

Furthermore, so long as the finding of wrongful desertion is undisturbed, the courts of Virginia could not allow maintenance to the wife.

In *Harris vs. Harris*, 31 Grat., 13, 17, the court held that when the wife is the offender, she cannot have alimony on a divorce decreed in favor of the husband; that so long as he has committed no breach of the matrimonial duty he is under no obligation to provide her a separate maintenance, for she cannot claim it on the ground of her own misconduct; that if the wife leaves her husband without sufficient cause, the court, upon decreeing the divorce, cannot allow her alimony out of her husband's estate. To the same effect is *Carr vs. Carr*, 22 Grat., 168, and *Latham vs. Latham*, 30 Grat., 338.

The Virginia court therefore having jurisdiction to pass a binding decree, and the effect of that decree in Virginia being to bar the wife's right to maintenance, it follows—that the decree is a bar to her suit for maintenance in the District of Columbia.

It is to be further noted that the laws of Virginia have made ample provision for the protection of every right of the wife and of the child born since the separation. As to the child, *which the appellee has never refused to support*, the court upon application may, as appears from Section 2263 quoted above, at any time make such decree as the circumstances of the parents and the benefit of the child may require.

With respect to the rights of the wife, *Sec. 3233 of the Code of Virginia* provides as follows:

> "Any unknown party, or other defendant, who was not served with process, and did not appear in the case before the date of such judgment, decree, or order, or the representative of any such, may, within three years from that date, if he be not served with a copy of such judgment, decree or order, more than a year before the end of the said three years, and if he be so served, then within one year from time of such service, petition to have the case reheard and may plead or answer, and have any injustice in the proceedings corrected."

If, therefore, she sustained any injustice, by reason of the fact that she was an absent defendant and did not appear, she could at any time within three years have had said decree set aside by showing that it was inequitable or unjust to her.

2. Is the Virginia decree invalid in that State because of insufficiency of the affidavit filed as the basis of the order of publication.

Objection is made to the affidavit upon which the publication was issued because based upon information and belief. The language of the affidavit is as follows:

> "Charles N. Thompson, plaintiff, this day made oath before me in said office, that Jessie E. Thompson, defendant in the suit aforesaid, is not a resident of the said State, as he is informed and verily believes." (R., p. 20.)

Section 3230 of the Virginia code provides:

> "On affidavit that a defendant is not a resident of this State * * * an order of publication may be entered against such defendant."

That the affidavit is in all respects sufficient to form a basis for the publication is believed to be fully supported by the authorities.

In addition to the authorities cited in the opinion of the Court of Appeals (R. pp. 500-501) we refer also to the following:

> "The following rule concerning the sufficiency of affidavits in other cases is held applicable to suits for divorce: If there is a total want of evidence upon a vital point in the affidavit, the court acquires no jurisdiction by publication of summons; but where there is not an entire omission to state some material fact, but it is insufficiently set forth, the proceedings are merely voidable." (7 Ency. Pl. & Pr. 110.)
>
> "In most jurisdictions it is held that the mere fact that some of the averments in the affidavit for publication are made on information and belief, will not render the affidavits insufficient." (17 Ency. Pl. & Pr. 60-61.)

In *Adam vs. Hudson*, 98 Michigan, 51, it is said:

> "An order for the appearance of a defendant in a chancery suit is the result of an adjudication that the statutory cause exists, and while the affidavit upon which the order is made must make a *prima facie* case, the degree of proof requisite is not the subject of review, if it can be said that such a case is made."

In the case of *Pennoyer vs. Neff*, 95 U. S., 714-721, the Supreme Court of the United States in passing upon an objection made to a judgment rendered upon constructive process, the objection being that the affidavit upon which the publication was based was insufficient, said:

> "The majority are of opinion that, inasmuch as the statute requires, for an order of publication, that certain facts shall appear by affidavit to the satisfaction of the court or judge, defects in such affidavit can only be taken advantage of on appeal, or by some other direct proceeding, and cannot be urged to impeach the judgment collaterally."

In *Long vs. Fife*, 45 Kan., 271, it was held, that where an affidavit for publication inferentially, but insufficiently, sets forth a material fact which ought to be expressly stated, the affidavit, if otherwise good, will be held to be merely voidable, and if the fact inferentially and insufficiently stated was in existence at the commencement of the action, the trial court even after judgment may allow the affidavit to be amended concerning the matter so inferentially and insufficiently stated, and the affidavit so amended will relate back to the commencement of the action.

In *Belmont vs. Cornen*, 82 N. Y., 256 it was held that, where an affidavit contained certain allegations tending to show that efforts had been made to find the defendant within the State, and that he was not there, it gave jurisdiction to the court, or judge, to pass upon the question of the sufficiency of the proof; and if so satisfied, neither the order for publication nor the judgment based thereon can be impeached collaterally.

In *Rowe vs. Palmer*, 29 Kan., 240, where an affidavit for service by publication states that service of a summons cannot be made upon the defendant within the State, and that the action is for foreclosure of a certain mortgage upon real estate, but fails to state or show that the defendant is a non-resident of the State, or that he is in any manner attempting to avoid the service of summons, it was held that such an affidavit is defective because of said failure, and that a service made thereon is voidable; but that it is not void if it is sufficient in every other respect.

See, also:

Smith vs. Smith, 3 Oregon, 363.
Ligare vs. R. Co., 76 Cal., 610.
Lawson vs. Moorman, 85 Va., 880.
Harris vs. Claflin, 36 Kan., 543.
Briton vs. Larson, 23 Neb., 806.
Fulton vs. Levy, 21 Neb., 478.

3. Did the giving of personal notice in the District of Columbia vitiate the constructive notice of publication and render the decree void in Virginia.

It is objected—and upon this objection the trial court based its decision refusing recognition to the Virginia decree—that the actual personal notice of the pendency of the suit, which was given to the wife, was irregularly given.

In addition to proceeding against the wife by publication, in order that she might not fail to have actual notice of the proceedings, a copy of the summons was sent to the District of Columbia, where she was living, and delivered to her here. This summons was not delivered to her until after the return day fixed in the notice of publication and in the summons as well.

Section 3232 of the Virginia code provides:

> "Personal service of the summons *scirefacias* or notice may be made by any person not a party to or otherwise interested in the subject matter in controversy, on a non-resident defendant out of this State, *which service shall have the same effect and no other, as an order of publication duly executed.* In such case, the return must be made under oath, and must show the time and place of such service, and that the defendant so served is a non-resident of this State."

Section 3232 also further provides:

> "When such order shall have been so executed, if the defendants against whom it is entered * * * shall not appear within fifteen days after the completion of the execution thereof, the case may be tried or heard as to them."

It is not denied that under the notice of publication the wife was given all the notice required by the Statute.

Without actual notice to her, the court was authorized to proceed. Can it be said that an irregular giving of actual notice of the pendency of the suit would defeat the jurisdiction which the court had already acquired by constructive notice? The trial court took the view that the plaintiff in the Virginia case, by having this notice delivered to the wife after the date on which she should have appeared under the notice of publication, dug a pitfall for her and misled her, because of the fact that she probably never saw the notice of publication at all. It is submitted that the opposite view expressed by the Court of Appeals is the more reasonable and is the view supported by the authorities.

In the *7th Ency. of Pl. & Pr.*, it is said (p. 109):

> "Although the summons or notice has been published, personal notice may be given to the non-resident defendant. The personal service is not abandonment of notice by publication."

The case of *Burnes vs. Burnes*, 61 Mo. App., 612, where in addition to giving notice by publication, the plaintiff also gave personal notice, the defendant made the same contention that is made here, to-wit, that the plaintiff abandoned the service by publication by substituting the personal notice, and that the latter superceded and invalidated the former. The Court said:

> "Thus to supplement the constructive service or notice by publication with that of actual notice would seem to be commendable rather than reprehensible, especially so in a case of this kind, and ought not to have the effect to invalidate or supercede the first service."

In *Dresser vs. Wood*, 15 Kans., 344, it was held that where service of summons was made on the defendant and the plaintiff afterwards procured a second service to be made, the procuring of a second service is not so far an invalidation or waiver of the first service as to allow parties or third persons to treat it as a nullity.

III.

In the event this Court shall take jurisdiction of the case and shall reverse the finding of the Court of Appeals that the Virginia decree is a bar to the wife's action, then inasmuch as that Court has not passed upon the husband's contention that aside from the Virginia decree the wife is not entitled upon the testimony in the case to separate maintenance, we assume that the case would be sent back to that Court to pass upon the testimony.

Since, however, the appellant contends that it is necessary for this Court to consider the testimony and devotes a considerable part of her brief to its discussion (pp. 12 to 17) we submit the following to show that—

The wife failed upon the testimony offered to establish that she was entitled to maintenance.

The burden is upon a married woman to show that she is justified in refusing to live with her husband in order to charge him with the duty of supporting her while living apart from him.

9 *A. & E. Ency. of Law*, 847.
2 *A. & E. Ency. of Law*, 97, 98.

The husband is obviously a man of good standing, both in Virginia, where he was born and reared, and in the District of Columbia, where he has been teaching the public schools since 1895, being now principal of the Jefferson School, one of the largest in the city. (R., p. 296.)

The excuse offered by the wife for refusing to live with the husband is his cruelty to her. She charges that from the day after their marriage, December 7, 1905, until the time of their separation, June 13, 1907, he was guilty of continuous cruelty of the most revolting character—cruelty that was brutal, coarse, and criminal. The charges contained in the bill while lacking in precision, and vague and general in their nature, may be summarized as follows:

1. Violent and abusive language and assault upon her on the day after the marriage.

2. Continued abuse and violence, consisting of chocking her on repeated occasions, throwing her down and bruising her about the body. (Par. 4.)

Breaking open doors of rooms in which she took refuge in the winter of 1906-1907, at 1006 B Street, S. W., and dragging her violently down the stairway—making his violence a source of alarm to the neighbors. (Par. 4.)

4. Cursing members of her family, including her dead father, and on such occasions often whipping her and striking her in the breast with his fist. (Par. 4.)

5. Manifestation of extreme anger towards her because of her pregnancy, and the demand that she engage in criminal acts to prevent the birth of the child; cursing, choking, and beating, bruising her and knocking her down, while in that condition. (Par. 5.)

6. Driving her while sick from one part of the house to the other, and on one occasion in very cold weather forcing her to leave the house in her night clothes. (Par., 5.)

7. Acquiescing in her being ordered out of their house at 1006 B Street, S. W., by his mother on the 13th and 14th of June, 1907. (Par. 5.)

8. Excessive use of intoxicating liquors frequently preceding cruel conduct, which, however, arose out of his deep-rooted and abiding hostility toward her.

It would seem that a fair balance of testimony should be required to establish the truth of such charges as have been made by the wife in this case.

Movements of couple after marriage.—On the evening of their marriage they went to Baltimore and the following day to New York, where they remained for several days. On their return from New York they spent one night at the National or Metropolitan Hotel, and then went to the Logan Apartment House. (R., p. 114.) They then went to Hamilton, where they remained until the death of her father on December 23d, when they came back to Washington. Her father was buried on the 27th; they returned to Hamilton on the same day and remained there about three weeks. On their return to Washington they spent one night on Fourteenth Street between K and I, and then went to the Logan, 13th and Iowa Circle, where they lived until June, 1906. (R., p. 134.) In June, 1906, the wife went to Atlantic City; the husband came for her after his school had closed, stayed two or three days and brought her back to Washington. They spent one night on Pennsylvania Avenue; she was at her mother's for two days at 1124 12th Street, N. W.; and then went to Hamilton, Va., arriving about July 1st. She remained at Hamilton until August 14, 1906. (R., p. 139.) She then came back to Washington, went to Atlantic City, after spending one night at Alexandria, to stay with her mother. (R., pp. 141, 145.)

Her mother brought her back to Linganore, Md., and left her there on September 29th or 30th, where she remained until October 8th (R., p. 152), when she came back to her husband. They boarded with a Mrs. Hall, 222 Eight Street, S. W., until about the middle of December, 1906. (R., p. 320.) On the date last mentioned they took the house at 1006 B Street, S. W. (R., p. 322), where they lived

until the final separation. She was in Providence Hospital in February, 1907, for about ten days. (R., p. 329.) After she left the hospital her husband sent her to Atlantic City, where she remained until the 15th of March, 1907. (R., p. 332.) She finally left him the following June.

Analysis of Testimony.—An analysis of the testimony, it is submitted, will show that no witness ever saw the husband mistreat his wife in any way, and with one single exception, which will be considered by itself, her case as to cruelty on the part of her husband rests upon her own uncorroborated statements.

1. We may consider, first, the uncorroborated testimony as to the cruelties practiced upon her.

(a) On page 113 of the Record, she describes the cruelty which she says was practiced upon the very next day after they were married: Without any fault on her part, his knocking her on the floor, taking her by the throat, saying every *horrible thing* he could to her; she escaped him, ran into the bath room and locked the door and remained there two or three hours until he came and threatened to break the door. "This ill treatment," to use her own words, "and treatment just like it, along the same lines, continued the whole time" they were in New York on their wedding trip. (R., p. 114.)

(b) On one occasion, while they were living at the Logan, she says he knocked her to the floor and, in doing so, knocked her into a rocking-chair and bruised her; that she had a black eye for a week and left him and went to Alexandria over night, getting back the next day for fear he would come to Alexandria and make a scene. (R., p. 117.)

(c) At 1006 B Street, S. W., he returned, she says, to ill treatment and made the most horrible scenes. She took refuge in different rooms. He broke open the doors and dragged her down the steps, and when he had dragged her half way down, threw her to the bottom. Would break

open doors like a wild man, compelling her to run out in her night clothes and to take refuge on one occasion in the vestibule of Mrs. Burr's house. (R., p. 121).

(d) On the night of June 12, 1907, he threw her upon the floor so violently that her knees were all bruised; choked her, saying she ought to be killed; fussed and cursed until four or five o'clock in the morning; and when she pretended to be asleep he would go over and take her by the throat and choke her and curse her and tell her she had to listen to him. (R., p. 124.)

(e) She became pregnant about the 15th of March. He said he would rather have a child by a "nigger" or the lowest thing in the gutter. He beat her, took her by the throat, and chocked her till she told him if they had a child it would be marked. Said there should not be a child. Had a colored woman to come to bring on her sickness; she sent the colored woman away. She came again, said Thompson had sent her and told her to use other means, and she sent her away; but he still insisted that something be done. (R., pp. 122, 123.) (See, also, Rec., p. 344.)

(f) Another charge which runs through her whole testimony is that he constantly indulged in the grossest profanity, and was given to cursing the members of her family, especially her dead father; that while they were riding to her father's funeral, he read the will and cursed her father, for making such a will (R., p. 114); that he said her family, mother and father, were a crew of blackmailers and the lowest scum in existence (R., p. 122); that when she left him at Hamilton on August 14, 1906, he was walking up and down, cursing and shrieking about everything, "cursing my dead father and my mother, and my brother and the whole family and myself included." (R., p. 145.) (See, also, R., pp. 178, 179.) Many other instances will be noted in the course of her testimony.

(g) On pages 124, 125 of the record she details the scene

in which it is alleged that Thompson's mother, an old woman seventy-three years old, and who had just entered the house of the parties for the first time, being invited down to see her daughter-in-law (R., pp. 188, 189-389), ordered Mrs. Eliot (Mrs. Thompson's mother) out of the house, and when told that Mrs. Jessie Thompson had sent for her mother, ordered her out. She says that her husband then also ordered her out and that when she came back the next day to pack her trunk his mother again ordered her out and that Thompson joined his mother in the order. She says that thereupon she packed her trunk, having already finished packing her wedding presents; took such furniture as she wished, and left never to return. The same scene is described on cross-examination. (R., pp. 174, 175, 176.)

It is doubtful, under the decision of the Court of Appeals in the case of *Lenoir vs. Lenoir*, 24 App. D. C., 160, whether this testimony is admissible at all; but if it be admissible, then the proof of all the foregoing acts of alleged cruelty, as well as of many others, both in word and in deed, vaguely and generally appearing in the torrent of the wife's testimony, rests entirely upon the testimony of the wife, herself.

The fact that the husband denies these charges in his answer and in his testimony would seem to be sufficient refutation thereof.

But, *even if undenied, the testimony it is believed would have every slight probative force; for*

(a) The testimony is inherently improbable. It can be reconciled with truth and experience on no theory other than that the husband is a monster—a theory utterly at variance with all the known facts of the case.

(b) Her whole testimony is colored by the grossest exaggeration— not only in the instances cited above, but her whole narrative abounds in superlatives.

She said that the Logan apartment house was more of a

boarding house, and that her life was utterly horrible there (R., p. 116); that when he was taking her to the hospital for treatment, in February, 1907, just before entering the hospital he told her they thought she was going to die and asked her to give him back the milling stock he had given her the fall before, so that her people would not get it (R., p. 122); that he told her that he was the best man living, "better than Jesus Christ" (R., p. 129); that the boarding house on Fourteenth Street, between I and K, where they spent one night was a horrible place (R., p. 134); that he treated her "most horribly" at Hamilton, meaning by "most horribly," "my speaking to him in the presence of other people, not only by ourselves but with others"—and his not replying when she addressed him (R., pp. 140, 141.) (Her friend, Eula Sparks, who was visiting her at this time, notwithstanding many marks of attention he showed, thought he *utterly neglected* his wife, because she heard her address a remark to him when he left the room and he did not answer her (R., p. 106); "that when Mr. Fairbrother, who was Thompson's supervising Principal, went to Maine, which is a prohibition country, "he had a barrel of whiskey sent there." (R., p. 401). Many other similar statements might be cited. (See, especially, p. 430.)

(c) Her testimony, in nearly all instances, where there are other witnesses, is in conflict with such witnesses. Her so-called rebuttal testimony contradicts practically every witness called by the husband. The testimony is in conflict with that of the husband and his mother as to what happened when she was finally leaving the house on B Street (R., pp. 387, 389), and she does not call her mother, who was present, to corroborate her statements. She contradicts the witnesses, Herndon, Henry P. Thompson, Fairbrother, Trotter, Hall, Mrs. Burr, Dr. Green, Laycock, Dr. Keene, Mr. Leith, Mrs. Williams. (R., pp. 391-430.)

As an illustration of her contradiction of other witnesses the account by others of the disturbance which she made by screaming at the Herndon home at Hamilton and her own account of the same incident may be specially noticed. Her husband says that on that occasion she had been sick; that the doctor had been there once or twice, and that as he was going in he met her coming down the steps in her night clothes, saying she was going to her father and going right away; that he picked her up and carried her back in her room and that she hollered and yelled and created so much excitement that a number of men came running to the house; that he went out and told them that there was nothing the matter; that that afternoon she got up and that they were walking about the yard, and she was apologizing and was very sorry for the scene she had made (R., p. 306). Mr. Herndon, at whose house they were living says that he was summoned from the store to the house and when he got there found Mrs. Thompson "hollering" and talking very loud; that after the course of two or three hours she calmed down, came out in the yard and apologized for her actions and the disturbance she had created (R., p. 196). Mr. Laycock says that he saw her after the occurrence, as reported, that they were walking about on the lawn and there was nothing to show that there had been any unpleasantness between them. (R., p. 238). The witness, Leith, testifies to the same effect on page 248; and Mrs. Herndon said that she had apparently been very ill that whole morning and had been attended by a doctor; that she remembered the scene that was created there; that she went to the room at the time it occurred; that she found her there in her night clothes, threatening to pack her trunk and leave, and Thompson pleading with her not to leave (Rec., p. 473.) Mrs. Thompson, who had been examined in chief and cross-examined in greatest detail about the cruelty that had

been practiced upon her by her husband at Hamilton, and had failed to mention any act of physical abuse, said on rebuttal discribing this incident that Thompson had come into her room and found her trying to lock the trunk, and that he flung her back against the bedstead so violently and treated her so roughly that she screamed and her screaming caused the people to collect outside of the house. (R., p. 430.)

A further illustration, which has already been mentioned, is the conflict between her testimony as to what occurred on the 13th of June, 1907, when she says she was ordered out of the house by Thompson and his mother, and the testimony of Mrs. Marian Thompson (R., pp. 187, 188), and that of the husband (R., pp. 337 to 339). It will be noted that while her testimony is in material conflict with that of her husband and his mother, she did not call her mother, Mrs. Eliot, who was present at the occurrence, to corroborate her testimony.

(d) The statement and complaints said to have been made by the wife from time to time to various witnesses, with a single exception, never charged physical abuse of any kind before the spring of 1907.

In her talks with Mr. Fairbrother, who was the intimate friend and counsellor of both, she charged him with drinking and not furnishing her with enough money, but didn't charge him with physical abuse. And, as a matter of fact, Fairbrother knew he was not drunk at the time the charge was made (R., p. 209); and was never drunk when under the supervision of the witness; and as to spending money from what he could find out, it seemed to him that she was getting more than Mrs. Fairbrother. (R., p. 210).

In her conversation with Mrs. Williams, in which she appeared to have unbosomed herself, she did not intimate that Thompson beat her or had ever beaten her or cursed her

father, although she said she was very unhappy; that he had grown indifferent to her; that he did not give her money to run the house as he should; that he was a drunkard; and that he did not like her mother. (R., pp. 259, 260).

In her conversation with Green, who was an intimate friend of the family, and who had worked many years for her father, and who had been requested by Thompson to get her to return to him; she charged Thompson with drinking and talking about her father, but did not tell him that he had whipped her on their wedding tour or at the Logan or at Hamilton. (R., pp. 293 and 295.) It was only just before she left him in the summer of 1907, that she came to his store and said that her husband had had her in the furnace room with her head up against the wall and his hand around her throat, threatening to strike her. (R., p. 295.)

In her conversation with her cousin, Dr. Johnson Eliot, on the occasion when he talked to her at the request of Thompson, with a view to getting her to return to him from Atlantic City, the only charge she made was that he was drunk on the wedding trip, that he was cross, unbearable, and that nothing seemed to please him. She did not mention physical cruelty as her grounds for not returning. (R., p. 386.)

A striking thing about the charge she made to this cousin, a physician, in the summer of 1906, while at Atlantic City, was that Thompson had tried to force medicine upon her to break her pregnancy. When she told him this he told her he would not advise her what to do about returning to her husband, but that she must advise with her mother and her people (R., p. 386). Yet she testified herself that the only time she was ever pregnant was when it occurred immediately after her return from Atlantic City, March 15, 1907. (R., p. 441.)

If at that time she made a false charge to her cousin, is it not possible that she might later have made similar false charges after she became actually pregnant?

Prior to the spring of 1907, so far as the record disclosed, she had never intimated to any person that he was guilty of cruelty to her person. The single exception was in the case of Eula Sparks, a particularly interested witness, who said that on the occasion when she left him for one night at the Logan, that she told her that Thompson had struck her. (R., p. 102.) On page 178 she said on cross-examination: "My body was covered with bruises and everyone saw it," and then said, "I don't mean everyone. I mean two or three people saw me who were perhaps in the same room with me." But she refuses to give the name of any person who had seen such bruises and not ever her mother has corroborated her testimony.

It is submitted as a striking and impressive fact in this case that while she was leaving her husband repeatedly and refusing to return to him, and making various kinds of charges against him in justification of her conduct, that she on no occasion urged as a reason for not returning the cruel physical treatment which she now says had been inflicted upon her from the very beginning of their married life.

(e) The fertility of her imagination and the bitterness with which she attacked all who opposed her is apparent from her testimony in rebuttal. (R., pp. 387-451.) (Not even her lawyer could prevent her from having her own way as to the manner in which she should testify (R., p. 400.) It will be sufficient to point out a few of many instances as illustrations:

It has already been pointed out how she charged an assault upon her at Hamilton on the occasion when the scene was made at the Herndon house, about which she had been silent in her examination in chief and on cross-examination.

She adds a further description to a scene at the Jefferson School, where he locked the door, maltreated her, threw her against the piano and nearly broke her back. (R., p. 423). As to the occasions of her leaving him at Hamilton, she was questioned in the utmost detail on her cross-examination, but in her rebuttal testimony she gives another reason, about which she had theretofore been silent. "His sister (Mrs. Herndon) was furious because I had packed my trunk, she said, without consulting her, and she said very harsh and unkind things to me and finally ordered me out of the house and told me never to put my foot in it again," and Thompson was there at the time. (R., p. 389.)

Her testimony abounds in mean and petty statements about her husband; e. g., as in contradicting his testimony that he kept a room at his sister's at Hamilton, she says that the sister had said that sometimes when there he had to occupy a room with the colored servant girl (R., p. 393); that he took public property away from the Jefferson School, piano covers (R., p. 390), brooms, and chairs (R., p. 395); that in New York where they seemed to have been busy seeing the sights of the city (R., p. 449) he took her into a vaudeville theater on Broadway which was a cheap place which they had to leave. (R., p. 417.)

And the witnesses for her husband likewise did not escape her bitterness. Mr. Fairbrother, a Supervising Principal of the City Schools, she would have such a toper that he bought his whiskey by the barrel (R., pp. 401, 402); as to Fraser (notwithstanding according to his testimony and that of the architects that the walls between his houses were fully 13 inches) he was so mean, according to the statements of her husband, he would not put an extra brick in the houses if he could help it, leaving the walls very thin (R., p. 414); and Green was a woman beater. (R., p. 417.)

2. We come next to the testimony of the plaintiff which is attempted to be corroborated.

Attempts were made to corroborate her testimony as to what happened at 1006 B Street, S. W., on the occasion about the middle of April when her mother was sent for.

She says: "At the end of April, one evening, Mr. Thompson so beat me and choked me that the neighbors heard it and sent for my mother, who came there, and I went away with her. That scene was a most terrible one. He used every vile imprecation toward my family and myself. I had to return to him. I had no home but his. I thought that most probably I was going to become a mother and the place for me was with my husband if I could possibly stay. I tried to stay. I returned. His ill-treatment continued." (R., p. 123.) On cross-examination, she says he became abusive because she suggested that they go across the park to get something to eat. He took her by the throat; treated her in a vile, abusive manner, and cursed her, and when she got back to the kitchen, he took her by the throat, banged her up against the wall by the kitchen door, finally worked around by the door that leads into the furnace room, took her back into the furnace room between the Gerdes residence and the Thompson residence, where the maltreatment took place, and he then locked the door so she couldn't run away; choked her again, took her by the throat, banged her against the wall, and jammed her against both walls in the kitchen (R., p. 165).

Upon this scene alone must rest her whole case so far as corroboration of her testimony by witnesses is concerned. She seeks corroboration in the testimony of Mr. and Mrs. Gerdes and of Mr. and Mrs. Hood, who claim to have been in the house next door, 1004 B Street. The substance of their testimony is that they thought from what was happening that a deadly assault was being committed upon her;

that they heard screams, cries for help and requests not to be hurt proceeding from Mrs. Thompson (R., p. 27). Gerdes thought Mrs. Thompson was in imminent danger of losing her life (R., p. 35). The testimony of Mrs. Gerdes is to the same effect (R., pp. 51-52-53), and would indicate that the disturbance was sufficient to have aroused the neighborhood and probably destroyed the furniture of the house, if not to injure the house itself. The testimony of Mrs. Hood (R., p. 68) attempts to become somewhat more definite than the testimony of Gerdes and his wife. She testifies Thompson had his wife in the basement holding her by the throat and ramming her head against the wall, and that she saw a shadow or reflection from the kitchen on the fence in the back yard. (R., pp. 68, 72.) The witness Hood testified that he heard a terrific racket and screaming up stairs, and thumping noise, "rough house, generally speaking," coming apparently from the parlor floor, but that it had attracted no special attention before one of the young ladies, who was upstairs, came down (R., pp. 83, 84). Mrs. Hood stated that the young lady came down and said that Thompson was killing his wife (R., p. 68).

They all agreed that Mrs. Eliot (Mrs. Thompson's mother) was called by telephone to come to the house and that she arrived upon the scene in from one-half to three-quarters of an hour after being called. Their testimony also tended to show that when Mrs. Eliot arrived, both before and after she obtained admission to the house, that Thompson abused her with most profane oaths, called her all kinds of vile names, such as prostitute, whore, etc. Gerdes said that Thompson was talking very loud, even after Mr. Fraser, the landlord, was called and went into the house, but that he heard little or nothing of what was said. He heard Mrs. Eliot say that she had come for her daughter, and all he heard Thompson say with respect to his wife was just about

the time Mrs. Eliot was leaving with her daughter, and was the objectionable language as to being the father of a negro (R., p. 28). According to the testimony of the other three, all the abusive language appears to have been used soon after the arrival of Mrs. Eliot and before she got into the house (R., pp. 52-59-69).

A careful reading of the testimony of these witnesses taken even apart from all the other testimony in the case affords an excellent example of how interested witnesses by the aid of hearsay and imagination may build up and testify to a whole story upon the slightest bits of actual knowledge.

Mrs. Gerdes and Mrs. Hood are sisters. The Gerdes had been acquainted with Mrs. Thompson's family for many years. Gerdes claims to have been an intimate friend of her father's. (R., p. 31.) Mrs. Hood at one place says that she saw through a crack in the fence a shadow on the back fence in the Thompson yard which showed her how Thompson was abusing his wife in the kitchen or furnace room (R., pp. 73, 76); at another place she appears to have seen the shadows from the sitting room (R., p. 68). The testimony of Trotter (R., p. 268) and Thompson (R., p. 334) shows that it was about dinner time and that is was not dark. The witness Hood also says he looked in the back yard at the same time his wife looked; said he saw nothing; there was no light showing through the back of the Thompson house; that it was closed up tight (R., p. 84). He also says that he heard a sound as if someone was being jammed against the wall (R., p. 83). Mrs. Thompson says there was no light in the kitchen; that there was a light in the hall and dining room (R., p. 413), and the architects show that the only possible way that any shadow could have ever been thrown on the back yard fence would have been from the light in the center of the kitchen when the kitchen door was

opened; that such a shadow could not then have been thrown by persons against either of the kitchen walls, even after dark. (Testimony of Jones, Rec., p. 250; Avery, Rec., p. 256.)

It is interesting to note how the witness, Mrs. Hood, reached her conclusion, that Thompson was ramming his wife's head against the wall, as appears from R., p. 71:

> "Q. Well, how can you tell that her head was being jammed against the wall?
>
> "A. Well, I will put it body, then. Well, her body may have been jammed against the wall, and I suppose her head must have been the most convenient part, and if he had her by the throat he certainly could have jammed her, and he had her by the throat, and she was screaming as if he was choking her, so it must have been her head that he was ramming.
>
> "Q. Do you say that because of the muffled sounds you heard?
>
> "A. Yes, and the jamming noise.
>
> "Q. And you predicate all that testimony as to choking her and having her by the throat and jamming her head on the sounds her heard?
>
> "A. Yes; I don't know what else I could do because I tell you he had her up against the wall and ramming her there somewhere.
>
> "Q. From the sounds you heard?
>
> "A. Yes, sir.
>
> "Q. And that is the sole basis of your testimony about the jamming and choking, etc.?
>
> "A. Yes, sir; and she screaming murder and hollering for help."

The extreme interest, bias, partisanship and lack of frankness of the witnesses are also apparent.

Mrs. Gerdes stated that although she had known Mrs. Thompson since she was a little girl, she had never spoken to her until about two weeks before testifying, when, after hearing that Mrs. Thompson "was going to open a case,

she thought she would assist her and sent for her." She had never discussed the case with her sister or husband, but knew her sister would testify, and merely brought her husband to the lawyer's office without being asked to do so to see if he would be any good in the case (R., pp. 55 and 56). She said that Mr. Thompson was not willing for his wife to leave with her mother, because "if she had left, he would not have had anyone to beat," and that "from the racket he made, he could not have done much more than fight" all the time (Rec., p. 59); that Mrs. Thompson was taken to the Hospital in February because he had near about beat her to death; that witness supposed he had beat her so much, he had to carry her there to get her mended up (R., p. 60). Although all she knew she had learned from hearing through the walls, she was not even willing to admit that Mrs. Thompson could have given her husband offense without the witness knowing it (R., p. 62), and she said that it would take her "two, three, four months to tell all" she knows about the Thompson's troubles (Rec., p. 63); that she looked and watched for Thompson every evening so that she could hear a row when he got in (R., p. 64); that women and men all over the neighborhood and people out of town discussed Thompson's character and his matters, but she refused to give the name of a single person she had ever heard mention the matter. (R., pp. 65-66.)

A similar condition of bias and prejudice prevailed with respect to Mrs. Hood, who was convinced that Mrs. Thompson had been so completely used up as to testify that when she went away with her mother that night "she walked with her mother at a very slow gait as though she were being taken to the hospital, and if she were taken to the hospital, I thought they would never bring her back alive" (R., p. 79); she thought Mrs. Thompson "was the most abused woman that was ever put on earth" (R., p. 78).

It will be noticed that Mrs. Gerdes and Mrs. Hood say

that the disturbance was in the basement wh[illegible]rs. Thompson says it was, but that Gerdes and Hood say the disturbance seemed to have been on the floor above (R., pp. 41, 83). It will also be noticed that Gerdes says that when he heard the disturbance the family was on the floor above, while the others say they heard it when in the basement, about dinner time (Rec., p. 41). It will be noticed that Mrs. Hood's testimony is strikingly similar to the testimony given by Mrs. Thompson on cross-examination; that Mrs. Hood says (R., p. 70) it seems that he had her head ramming it against the wall, and it would seem reasonable that Mrs. Hood and Mrs. Thompson had, at least, talked with each other about what had happened.

A peculiar circumstance is found in the fact that Mrs. Thompson and Mrs. Gerdes were both unwilling to recognize that they had any acquaintance on B Street; that Mrs. Thompson should deny any acquaintance with Mrs. Hood. Mrs. Gerdes said that she had known Mrs. Thompson all her life but had never spoken to her until two weeks before testifying, when she sent for her in order to help out. Mrs. Thompson said she did not know the Gerdes people at all while she lived on B Street (R., p. 162), but that when she was leaving on April 14th Mrs. Gerdes was at the window and called out: "Mrs. Thompson, if you try to get maintenance from Mr. Thompson, I can be a witness in the case, I have overheard a great deal" (R., p. 160), and that when the case was coming on she hunted up Mrs. Gerdes and told her she was wanted by the lawyer, and Mrs. Gerdes told her that Mrs. Hood and her husband could also be witnesses; that all she had to do was to call Mrs. Hood by telephone and they would all come (Rec., p. 161).

Mrs. Thompson further says "that she had no idea what they were going to testify to when they came to the first session of testimony, and that they had never told her

anything about the matter before they went upon the stand (R., p. 160). Gerdes says that when he was taken to Mr. Lewin's office, before he testified, he didn't even tell Mr. Lewin about the case. He merely told Mr. Lewin if there was anything he could say, he would say it, and that Mr. Lewin didn't even ask him about the case (R., p. 49).

Miss Hutchinson, who lived at the Gerdes house, 1004 B Street, who also testified on behalf of Mrs. Thompson, said that she met Mrs. Thompson at the Gerdes residence; that Mrs. Thompson visited there, and that Mrs. Hood introduced her to Mrs. Thompson on the steps of the Gerdes house where Mrs. Thompson was stopping, talking to the family (R., pp. 88-89). As before pointed out, Gerdes said that he had known Mr. and Mrs. Eliot for 18 years (R., p. 31).

Why this effort on the part of Mrs. Thompson and these witnesses to conceal their acquaintance and association with each other? Would the consciousness on their parts that they had been collaborators in bringing about trouble and preparing the monstrous charges against him have made them desirous of concealing their relations?

It is evident that there had been discussion in the Gerdes house before this occasion about calling up Mrs. Eliot. Mrs. Hood said she had told Mrs. Gerdes before that if she was ever at the house when any trouble came up she was going to call up Mrs. Eliot (R., p. 54). Mrs. Thompson had prior to this time requested neighbors to call up her mother and ask her to interfere (R., p. 408). The Gerdes doubtless knew the dislike that existed between Thompson and his mother-in-law. Gerdes said, that although he thought Mrs. Thompson was in imminent danger of losing her life, he called Mrs. Eliot from her home in the Northwest and thought she "was a great deal better than a police officer" (R., p. 37).

Immediately after the testimony of the Hoods and Gerdes had been given, Mrs. Eliot, the mother-in-law, brought suit against Thompson for slander, claiming $20,000 damages. (R., p. 159). But although she had been so active in stirring up trouble and was an alleged eye-witness to the cruelties charged, she did not take the stand on her daughter's behalf.

There were three other witnesses to part or all the disturbance, we are now considering, against whom the charge of bias or interest cannot be brought. One of these witnesses, Miss Mary J. Hutchinson, was called by Mrs. Thompson herself. She testified as follows:

> "It was the latter part of April; it was right after dinner; I went to my room and I heard a scream and put my head out of the window, and I heard Mrs. Thompson pleading to Mr. Thompson to 'please don't' several times, like she was in distress. * * * I went down stairs and reported it to Mrs. Gerdes." (R., p. 87.)

She said that Mrs. Hood, after that, phoned to Mrs. Eliot and that Mrs. Eliot came down and took Mrs. Thompson home with her that night; said she was there when Mrs. Eliot came and that Mrs. Eliot went to the front door of Mrs. Thompson's home, and that she and her sister went out soon after Mrs. Eliot arrived. (R., pp. 91 and 92.) Said she saw the Hoods and Gerdes in the dining room as she went out; that at the time she told Mrs. Gerdes what she had heard; Mrs. Gerdes was on the steps coming up from the dining room and evidently had not heard the noise at all (R., p. 94); that she immediately went back to her room and all had quieted down in the Thompson house (R., pp. 93, 94); and that she told everything that occurred that night so far as she knew while at the house (R., pp. 91, 93).

Could anything *be in more striking contrast* with the highly colored testimony of the Hoods and Gerdes than this testimony of Miss Hutchinson?

William H. Trotter, telegraph operator, who was occupying the back room on the second floor of the Thompson house, was in his room at the time of the disturbance, with his door partly opened, and was in a position to hear what was happening; that he heard Mrs. Thompson down stairs talking in a very loud, excited voice, sort of hysterical like, and Thompson pleading with her, trying to calm her and begging her not to make a scene. Then he heard a door slam, heard Thompson pleading with her to open the door, and then heard a racket or noise like something heavy fall on the floor. The witness went to the back window and saw Mrs. Thompson in the yard with her foot on the step-ladder, saying, if he didn't leave her alone, she would climb the ladder and go over the roof of the shed. This was about 6.30 or 7.00 o'clock. He could see her distinctly. Thompson came up on the second floor and she came up stairs (R., pp. 268, 269). A little later, he heard the front door open and a lady's (Mrs. Eliot's) voice.

"Q. What did he say to her?

"A. First she said something to him.

"Q. What did she say to him?

"A. She said, she wanted to know what all this meant, and what he was doing to her daughter. Mr. Thompson said: 'Mrs. Eliot, you mean what is your daughter doing to me.' He said to her: 'You have made 30 years of unhappiness in your own home, and now you are trying to break up my own home.'

"Q. Just detail, now, the conversation, as it occurred.

"A. Mr. Thompson then said to her——

"Q. What did she say to him when Mr. Thompson said that to her?

"A. She wanted to know what he was doing to her daughter, and trying to murder her. Mr. Thompson told her that he wished she would never come in his home again; that she had made hell in her own home for 30 years; and she was not satisfied until she did the same in his home. About that time some gentleman came in.

"Q. Who was that gentleman, do you know?

"A. Mr. Thompson called him Mr. Fraser.

"Q. Now, did you hear Mr. Thompson say on that occasion to Mrs. Eliot, or this woman whom he was talking to at the front door, that 'I would as soon have a child or baby by a negro as by that thing,' or words to that effect?

"A. No, sir; I didn't hear anything like that at all.

"Q. If such words as that had been spoken by Mr. Thompson to Mrs. Eliot, or this woman who came to the door, as you have spoken about, could you have heard them?

"A. I certainly could have.

"Q. Did you hear Mr. Thompson say to this woman who came to the door, or to Mrs. Eliot, that she was a whore, and her mother was a whore, and so on, words to that effect?

"A. I most certainly did not.

"Q. If he had used such language as that to her, were you in a position to have heard it?

"A. I was." (Rec., p. 269).

After Mr. Fraser came in he heard Mrs. Eliot tell Mrs. Thompson to get her clothes on and came with her. He went out a little later and found Mr. Thompson standing on the corner talking with Mr. Fraser. (R., p. 270). Thompson was not excited on this occasion, but spoke in a natural tone of voice, and Mrs. Eliot's voice was rather loud and excited. He heard Mrs. Eliot say to Fraser, "Take this, Mr. Thompson might kill himself." (R., p. 271.)

George E. Fraser, the landlord, who came in in the midst of the supposed disturbance, said that he was called by Mrs.

Hood and told that Thompson was beating his wife and that he was wanted to come over. Mrs. Elliot appeared in the door soon after he arrived on the front sidewalk, and told him that Thompson was drunk and was beating his wife, and that she was upstairs locked in the room afraid to come out. Mr. Thompson then appeared on the scene and told him that the woman was irrational and didn't know what she was talking about. Thompson appeared almost instantly after he saw Mrs. Eliot. He didn't appear excited, and when he stated that Mrs. Eliot didn't know what she was saying and that he would explain the matter later, Mrs. Eliot handed him a pistol saying she was afraid he would kill Jessie. He took the pistol, put it in his pocket, and when he got home and examined it found it was unloaded. Thompson appeared to be perfectly sober and witness was near enough to him to have smelled his breath. A little while afterwards he saw Thompson going by and went down to the edge of the sidewalk and talked with him. (R., p. 277.) Witness didn't see Mrs. Thompson in the house nor say a word to her while there on this occasion. (R., p. 278.)

The testimony of Miss Hutchinson, Mr. Trotter and Mr. Fraser is entirely consistent with the explanation of the incident made by Thompson on pages 333 to 336 of the record, and shows, we believe, conclusively, that the incident was nothing more than one of the periodical outbreaks which Mrs. Thompson was accustomed to make, and that the serious trouble growing out of the situation was brought on by the mother-in-law.

3. The attitude of the parties toward each other, the manner in which they discharged their marital duties, and which it was that was desirous of preserving the marriage status, will clearly appear from a review of the various instances under which he was deserted by his wife.

It will probably not be contended by counsel for Mrs.

Thompson that as a wife she was very helpful to her husband. Her parents had not thought it a wise marriage. According to her own testimony her father had told Thompson that he had better marry a different kind of a girl than she was, and she had heard people call her an heiress, and will get one-third of her father's estate upon the death or re-marriage of her mother. (R., p. 148). Dr. Green said that her father opposed the marriage and thought she would make a fit wife for nobody but a millionaire; said he never could do anything with her and so told Thompson personally. (R., p. 290).

Mr. Laycock, Mr. Thompson's partner, says that on one occasion when he was invited to spend the night at the Thompson home in the city that she left before they got through supper for a church meeting, leaving Thompson to clear up the table and put away the dishes, that in the morning Thompson got up and got breakfast for him. (R., pp. 234, 235.)

Witness Fraser said that when he went in one Sunday morning to see about a door that would not shut in the back-yard, he saw a fowl in a pan and heard someone say: "Now, Charlie, you have that ready. I am going to church and you have it ready when I come back." (R., p. 278.)

Mrs. Burr said she had seen Thompson bringing his meals in and cooking them and that she (Mrs. Thompson) said she wanted a servant, and heard her say on several occasions that she was not going to cook herself. Had often seen Thompson working around the house, sweeping, dusting and washing dishes. (R., p. 277.)

Fairbrother said that he had heard some talk about her saying, "I will not get up and get breakfast for any man," and that he went and talked the matter over with her and urged her to get up and prepare his breakfast, to tell him good-bye when he left and meet him at the door when he

came in, and that he said to her: "Things don't look well, Miss Jessie. I can't see the handiwork of the wife. Things are not set up here yet—it is not home;" and understood from her that she would commence that way at once. (R., pp. 207, 208.)

It is believed that it will be equally clear that Thompson did his full part at least to supply her physical needs. He apparently took her to good boarding places in the city while they boarded and when they took a house he selected a house of pleasant location fronting on the grounds of the Department of Agriculture. Mr. Fairbrother thought that it was in a very good condition for beginners (R., p. 207); that Thompson was constantly trying to fix things up and making things pleasant about the house and making himself a very helpful man about the house. (R., p. 210.) See also testimony of Mrs. Thompson (R., p. 406). It appears not only from Thompson's own testimony but from the testimony of Mr. Laycock (R., p. 238) and others, as well, that he did all he could to make her enjoy herself while they were at Hamilton, providing her with a horse and buggy, inviting her friends up there, providing her with the best room in the Herndon house, allowing her to buy goods at the store (R., p. 237); at the home of Mr. Hall she was provided with the best rooms in the house, took meals with the family, had a horse and buggy provided for her to go wherever she pleased, and he took her out frequently driving and seemed in every way to amply provide for her. (R., pp. 286, 287.) He cooked her meals and took them to her when she was sick. (R., p. 399.) At the drug store she was free to buy everything she wished and Thompson almost every evening was in the store getting ice cream, candy, soda or something of that kind. (R., pp. 293, 294.) According to her own testimony she could buy whatever she wished out of the grocery store in the neghborhood at 1006 B

Street. (R., p. 169.) In short, there is no evidence at all of any neglect whatever to supply her physical needs.

On the contrary it appears that he showed her the attentions that are usually considered the evidence of devotion. On her birthday he sent a beautiful bracelet. (See R., p. 319.) At the hospital he sent her flowers and called, according to her statements, at least eight out of the ten days that she was there. (R., p. 444.) At Hamilton, when she asked it, he went out and bought her the share of milling stock (R., p. 171); in June of 1906, he sent her to Atlantic City, and when school closed went for her to bring her back (R., p. 134); and in March, 1907, he again sent her to Atlantic City. She says he carried the locket with her picture and when he lost it said he had lost his mascot. (R., p. 399.) So that from the whole record and from her own testimony, she apparently fared as well, to say the least, as the average woman who marries a school teacher.

The testimony shows that in the period extending from the time of their marriage, December, 1905, to June, 1907, that she left him on at least five different occasions.

She *first left him* at the Logan, went to Alexandria and spent the night and came back the next day without letting him know where she was (R., p. 117). The witness, Eula Sparks, says that he was very anxious for her to return on that occasion. Thompson says that he did not sleep any that night but was worrying about her that night and all next day. (R., p. 304.)

She *next left him* on August 14, 1906, at Hamilton, Va. None of the witnesses from Hamilton, including his mother, sister, brother-in-law, brother and partner, knew of any reason whatever for her leaving him. She says that she had intended to go only to Alexandria for a day and only changed her mind on the day she left because of what some members of his family had said about her on that day. She

says she heard his sister say: "Poor Charlie, when he comes home at eleven or half-past eleven at night, tired out from night school, Jessie raises Cain if he does not put on his good clothes and take her down town somewhere to supper;" and also heard his brother say that they ought to be separated. Thereupon she decided to go away with Eula Sparks and leave him. (R., pp. 140-42.)

According to the testimony of Mr. Herndon (R., p. 198) as well as of Mrs. Herndon, she had carefully prepared in advance for leaving by putting her silver-ware and wedding presents in her trunk, and that Thompson did all in his power to keep her from going is clear. (R., p. 204.) (See also Testimony of Thompson, R., p. 310.) He (Thompson) followed her to Washington (R., p. 311) and tried to persuade her to return to him. Eula Sparks says he met them on the street and pleaded with her to come back and that he was most solicitous and anxious for her to return (R., pp. 109, 110.) Through Mr. Williams he sought to intercept her at the Station in order to find out where she was going so that he could write to her at Atlantic City. (R., pp. 265, 266.) Called up Dr. Green, who was in Atlantic City, by long distance telephone and had him to go to see her. He saw her cousin, Dr. Eliot, who was on his way to Atlantic City, and travelled with him to Baltimore, and asked him to try to get her to come back. (R., p. 314). He wrote to her—tried to blame himself for everything, real and imaginary, that he could think of; and used every influence possible to get her to return.

It will be noticed, according to her own testimony, that it was upon her mother's invitation and at her mother's suggestion that she went to Atlantic City and that it was upon her mother's advice that she did not return, her mother telling her that she thought if Thompson did not have her for a few months he would think more of her when she re-

turned, and that it was not until after Mr. Thompson promised to do *the right thing* in October that the mother advised her to go back to him. (R., pp. 148, 149.) That Mrs. Thompson was as ready to appeal to her mother as her mother was to interfere, appears from her own testimony where she says she went over to Mrs. Burr and asked her to 'phone and ask the mother to come down and look out for her. (R., pp. 407, 408). Mrs. Burr says that on this occasion Mrs. Thompson came to her house about half-past seven or eight o'clock very much excited and wanted her to phone to her mother to come right down, that she was not going to stay with Mr. Thompson and wanted her mother to take her home; that Mrs. Thompson said that a friend of hers was there and that Mr. Thompson had been relating to that friend something about her father's papers, and it had made her mad and that she was not going to stay with him and wanted her mother (R., p. 299.)

Thompson's attitude toward his wife and his efforts to get her to return is shown by the letters found on pages 315, 319, 348 of the Record. He sent her money, presents, drove across the country twenty-eight miles to meet her; found that she had completely changed; her attitude was fierce. (R., p. 317). She finally agreed to come back only on condition that he would turn over to her the milling stock because she said that if things were not to her liking and she had to leave again, she wanted something to live on. (R., pp. 318, 171, 172.) So he gave her the stock and she came back in October and they went to boarding at the residence of Mr. Hall, 221 Eighth Street, S. W.

At Hall's, because he was not anxious to go to housekeeping she "got mad" and said that she would go to housekeeping if he didn't. She "got mad" and *left him the third time*, and was gone two or three days. (R., p. 321.) He called her up by long distance telephone and got Hall to go and get her.

Mr. Hall says that Thompson did not want to go to housekeeping and that he asked one or two people to speak to her to show her the disadvantages of starting to housekeeping at that time, but she said Thompson had promised to go to housekeeping and that if he did not rent the house and go to housekeeping that she was going to leave him, that she would not stay in Hall's house or anybody else's house, and that going to housekeeping was the only solution. (R., p. 220.) Hall talked over the matter with Mrs. Thompson several times because he felt very kindly toward both and would have done anything he could to bring them closer together; she was away two or three days, and the witness thought she went to Alexandria and Thompson did not know where she was. (R., p. 227.)

About the time they were having the difficulty about this question of money, he wrote her a letter which is found on pages 323 and 324 of the Record, setting out his condition, his salary, his debts and obligations, sending her the $20 and asking her to try to see how she could manage on that for the time. In reply he received a letter (found at the bottom of page 324), in which she announces that she is going to leave him again, and which clearly indicates that the whole matter of complaint she had at that time was the amount of allowance he was willing to give her.

Thompson says that she demanded $30.00 a month for spending money. He asked her to get along on $20.00 until he got some of his debts paid off, and sent her four $5.00 bills, which she refused to receive. (R., p. 322.) He then agreed to give her $25 a month spending money. Thompson gave in and said they would go to housekeeping if that would be the source of happiness. He rented the house at 1006 B Street, S. W., where he appears to have done most of the work. (R., pp. 326 to 328.)

After they went to housekeeping *she left him the fourth*

time soon after the middle of December. She left on this occasion because she didn't think he gave her money enough. (R., p. 322.) He got Hall to go for her again. Hall called her up by 'phone and got her to meet him (Hall) at the Raleigh Hotel for lunch and she agreed to go down to the Jefferson School. The whole difficulty seemed to be a question of money. She said she would not stay with him unless he would furnish her money as follows: $25.00 a week for market money; $35.00 a month spending change, to employ a servant and pay the other household expenses, which were rent, gas bills, fuel bills and such as that—an aggregate far in excess of his income. She said unless she got that amount of money that she would not live with him. (R., pp. 222, 223), but she finally went back.

She was sick in February and he sent her to the hospital for ten days and after her return from the hospital to Atlantic City. While there he wrote her letters and sent her telegrams. (R., pp. 332, 329.) She returned about the middle of March.

After the occurrence in April of the scene testified to by the Gerdes, in which her mother, Mrs. Eliot, came down and took her away, her mother again came and took her away in June, bringing about the final separation.

The Trial Court in its opinion criticizes Thompson for the language he used toward his mother-in-law at the time of the final separation. (R., p. 485.) It is obvious that there was no great love between Thompson and his mother-in-law and what he said to his wife on this occasion about going with her was merely repeating things which his wife had told him. He felt the mother-in-law was responsible, to a large extent, for her daughter's conduct; he knew she had taken her away from him in the summer of 1906 and kept her away for the period of two months. She had taken the daughter away again in April and now in the presence

of his own mother, who had been invited to visit them, she had come to take his wife away again. His feeling toward the mother-in-law is shown in the letter beginning on page 315, where he says: "As for your mother and of what I know and of what you have said of her actions in the past, and of what your father, who was a good man, has said about her and not only to me but to others, I naturally take no stock in it at all." Mrs. Thompson had told Thompson's mother, of whom she had seemed very fond and between whom letters and correspondence often passed, that her own mother never had treated her kindly, that she had never acted toward her as a mother ought to and that she had taken away from her money that her father gave her to buy her wedding clothes with. (R., p. 191.) Dr. Green said: "There never was a man any more in love with a woman than he (Thompson) was in love with his wife that I ever saw. He was desperately in love with her for many years before they were married and after they were married, and I believe he is in love with her today." (R., p. 290.) She says that he hated her and told her the day after they were married, told her continuously that he hated her and told her the day after he married that he wished he had laid his head on a railroad track. (R., p. 113.) His conduct in this case and his repeated and unceasing efforts to get her to return to him seems hardly reconcilable with any other theory than that he was intensely and devotedly attached to his wife. When the mother-in-law, who despised him, who had caused him so much trouble before, and for whom he had absolutely no use, was again breaking up his home in the presence of his own mother, it would seem that there might be some palliation for his repeating to his wife the things which she had said to him and especially when it was repeated not for the purpose of wounding his wife's feelings but for the sole purpose of dissuading her from leaving him and following her mother.

His conduct in instituting proceedings in Virginia and pushing them to a speedy termination also seems to be found worthy of criticism by the Trial Court. The question arises: What was he to do? He sought to get her to return to him (R., p. 340); he wanted her back and was ready to receive her. If his contention was true that she had deserted him unjustifiably after he had done all in his power to provide for her comfort and meet her needs, was he compelled to accede to every demand she chose to make upon him under such circumstances? She demanded that he pay her $100.00 a month. The demand was peremptory—"$100.00 or file a bill." (R., p. 347.) He fully realized what such a course meant to him, the notoriety that would attach thereto, the irreparable injury that it would do him, and rather than have their matters in Court, he was willing, even under those circumstances, to make contribution to her. He offered $50.00, $60.00 a month but she was unyielding. (R., pp. 429, 185.)

She filed her bill—the bill, in this case, charging him with acts of cruelty which, if proved, stamp him as a monster unworthy of a place in civilized society, much less to hold the principalship of a school in which a thousand children are subject to his supervision. Under such circumstances what was left for him to do? Having his domicil in Virginia he could have no relief here because this Court could not grant him a divorce. If he was entitled to divorce, as he conceived himself to be, he could seek it no where else than in Loudoun County.

What has been the course of his wife since instituting the proceedings in this cause? Not content with the notoriety thrust upon him by the atrocious charge contained in her bill and the litigation incident thereto, she filed another suit against him for $70,000—a suit, which, under the law, it was impossible for her to maintain and which was held

bad on demurrer both by the Courts below and by this Court. She was not satisfied with that proceeding. As soon as the first session of testimony in this cause had closed her mother filed another suit against the defendant for $20,000 for alleged slander, the publicity of which she says her mother learned of when the Gerdes' and Hood testimony was given on her behalf. (R., p. 159.)

And it has not been enough for her to proceed against him in the courts. She went to members of the Board of Education, to the President of the Board, to the Superintendent of Schools and told them the most important parts of the story she had told in this case. She told them that he got drunk; that he beat her; that he cursed her; that he cursed her dead father and that he cursed her mother. (R., pp. 154, 155). It is believed that her course of action has had but one object and end—namely, his dismissal from the public schools, and the complete ruin of his reputation and standing in this community, and that such a course cannot commend her to the favorable consideration of a court of conscience.

It is respectfully submitted that the judgment of the Court of Appeals appealed from should be affirmed.

A. E. L. Leckie,
Joseph W. Cox,
John A. Kratz, Jr.,
Attorneys for Appellee.

THOMPSON v. THOMPSON.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 45. Argued November 8, 1912.—Decided January 6, 1913.

Notwithstanding the obligation to make continuing payments for maintenance of a wife and children is not, even when fixed by judicial decree, in the nature of a technical debt, it may, when so fixed, be estimated on expectancy of life, and the total amount may sustain a jurisdiction based on amount involved.

Statutory maintenance is assimilated to alimony under § 980 of the Code of the District of Columbia.

In this case, as the amount due under a judgment of the Supreme Court of the District of Columbia for support and maintenance at the rate of $75.00 a month together with amount to accrue due during expectancy of life of the wife amounts to over $5,000, this court has jurisdiction under the act of February 9, 1893.

The words "every court within the United States" as used in § 905, Rev. Stat., carrying into effect the full faith and credit clause of the Constitution, include the courts of the District of Columbia.

The full faith and credit clause of the Federal Constitution, and the statutes enacted thereunder do not apply to judgments rendered by a court having no jurisdiction.

Under the prior decisions of this court, service of the summons in a suit for divorce may be by publication if brought in a court of the State of matrimonial domicile. *Atherton* v. *Atherton*, 181 U. S. 155; *Haddock* v. *Haddock*, 201 U. S. 562.

The state in which the parties were married, where they resided after marriage, and where the husband resided until the action for divorce was brought, is the matrimonial domicile and has jurisdiction over the absent wife.

A decree of divorce is not valid even when granted by a court of the State of matrimonial domicile except on actual notice to the defendant, or, if a non-resident, by publication according to the law of the State.

Where the law of the State of matrimonial domicile permits the affidavit on which an order of service by publication is granted to be

made on information and belief, the court acquires jurisdiction and the judgment based thereon is entitled to full faith and credit in the courts of other States.

This court is bound to assume, in the absence of any general law or policy of a State to the contrary being shown, that where the court adjudges the proceedings to be in accord with proper practice that such is the case.

Although an affidavit used as a basis for an order of publication of the summons may be defective in the mode of stating material facts, if the facts are stated, the judgment, though voidable on direct attack, is not void on its face and *coram non judice*.

Where the courts of a State have held that a wife may by her conduct forfeit the right to the support of her husband, and cannot have alimony on a divorce decreed in his favor, the courts of other States must give the decree full faith and credit as foreclosing the right of the wife to have alimony and a bar to a suit for maintenance in the courts of other States.

35 App. D. C. 14, affirmed.

THE facts, which involve the degree of faith and credit to be given by the courts of the District of Columbia to a judgment of divorce obtained in Virginia on service of the summons by publication, are stated in the opinion.

Mr. William M. Lewin for appellant:

This court has jurisdiction. Section 980 of the Code is declaratory of the inherent powers of a court of equity, and alimony and maintenance mean the same thing. *Lesh* v. *Lesh*, 21 App. D. C. 475, 488.

Prior to the effect of the Code the amount of alimony, even when in arrears, might, for cause shown, be changed by the court. *Tolman* v. *Leonard*, 6 App. D. C. 224, 233; *Davis* v. *Davis*, 29 App. D. C. 258, 263.

The Code provides for enforcement of decrees of the Supreme Court of the District of Columbia, and a decree for alimony, or maintenance, is no exception to this rule. It is subject to immediate execution, and is appealable. Code D. C., § 113; *Lesh* v. *Lesh*, 21 App. D. C. 475, 484, 485.

The court's discretion as to the amount is, in the first instance, judicial, not arbitrary. The discretion as to future installments is equally so, and such installments will not be interfered with except for good cause shown. *Weber* v. *Travelers' Ins. Co.*, 45 Fed. Rep. 657; *Langan* v. *Langan*, 86 California, 132, 133; *McCaddin* v. *McCaddin*, 116 Maryland, 567, 574.

It is not necessary that the amount in controversy should be expressly stated in the bill of complaint. *United States* v. *Freight Association*, 166 U. S. 290, 310; *Ex parte Bradstreet*, 7 Pet. 634, 647.

The appellate jurisdiction of this court extends to all cases in which there is a final decree involving more than five thousand dollars.

The decree of the Court of Appeals, from which this appeal is taken, is undoubtedly a final decree, and its finality is not affected by the fact that leave is given to apply at the foot of the decree. *C. & P. Tel. Co.* v. *Manning*, 186 U. S. 238, 241; *French* v. *Shoemaker*, 12 Wall. 86, 98; *Red River Cattle Co.* v. *Needham*, 137 U. S. 632, 635.

A claim of alimony, even *pendente lite*, may afford the basis of this court's jurisdiction on appeal. *De La Rama* v. *De La Rama*, 201 U. S. 303, 318.

The fact that the decree provides that payment shall be made periodically, instead of *in solido*, does not affect the question of jurisdiction, as the amount of the possible, indeed reasonably probable, payments under the decree will exceed five thousand dollars. *B. & O. S. W. R. R.* v. *United States*, 220 U. S. 94, 106.

In determining the amount involved, for the purpose of appeal, the scope of the inquiry may be, and generally is, broader in a suit in equity than in a case at law. *Stinson* v. *Dousman*, 20 How. 461, 466–467; *N. E. Mortgage Co.* v. *Gay*, 145 U. S. 123, 131–132; *Troy* v. *Evans*, 97 U. S. 1, 3; *Marshall* v. *Holmes*, 141 U. S. 463, 595.

Jurisdiction in this case is measured by the value of

the right to be protected, and not by the value of some mere isolated element of that right. *Berryman* v. *Whitman College*, 222 U. S. 334, 346.

Statutes regulating appeals are remedial, and this court has always construed them liberally. *The Paquete Habana*, 175 U. S. 677, 682; *Wetmore* v. *Rymer*, 169 U. S. 115, 128; *Harris* v. *Barber*, 129 U. S. 366, 369–370; *Smith* v. *Whitney*, 116 U. S. 167, 173; *Audubon* v. *Shufeldt*, 181 U. S. 575, 578.

The decree is limited by the pleadings, which adhere to the requirements of the Code. The meaning of the decree, therefore, is that the husband shall pay to the wife at the least the sum of seventy-five dollars a month as long as the child may be dependent upon her for care and support. *Barnes* v. *Chic. &c. Ry.*, 122 U. S. 1; *Pierce* v. *Tenn. Coal &c. R. R. Co.*, 173 U. S. 1, 9; *Ex parte Hart*, 94 California, 254; *Carnig* v. *Carr*, 167 Massachusetts, 544; *McCaddin* v. *McCaddin*, 116 Maryland, 567, 574.

This court will take judicial notice of the usual tables, showing the expectancy of life of the parties and of the child. *Lincoln* v. *Power*, 151 U. S. 436, 441.

The Virginia decree was not final within the meaning of the full faith and credit clause of the Constitution. Virginia Code, § 3233.

Defendant was not served with process under the provisions of § 3232 of the Code of Virginia. *Raub* v. *Otterback*, 89 Virginia, 645.

This left the decree subject to be set aside in the discretion of the court.

While the appellant's rights cannot be made to depend upon this element of favor or discretion, it is sufficient to prevent the decree being final within the meaning of the full faith and credit clause of the Constitution. *Cheely* v. *Clayton*, 110 U. S. 701, 708; *Roller* v. *Holly*, 176 U. S. 398, 409; *Lynde* v. *Lynde*, 181 U. S. 183, 187.

The jurisdictional affidavit in the Virginia case, being

made upon information and belief, is not sufficient as a basis for an order of publication; such publication was therefore unauthorized and all proceedings based upon it null and void. *Hollingsworth* v. *Barbour*, 4 Pet. 466, 474; *Clowser* v. *Hall*, 80 Virginia, 864; *Rice* v. *Ames*, 180 U. S. 371, 374; *Holmes* v. *Holmes*, 15 Nebraska, 615, 616; *Fulton* v. *Levy*, 21 Nebraska, 478, 482. And see Virginia Code, § 2959, 3230, 3282; Form of Affidavit for Attachment, Code, p. 1571; Form of Order of Publication, Code, p. 1702.

An order of publication is not a pleading, it is process. *Loeb* v. *Columbia &c. Trustees*, 179 U. S. 472, 482; § 954, Rev. Stat.; *Brownfield* v. *South Carolina*, 189 U. S. 426, 428; *Tucker* v. *United States*, 151 U. S. 164, 169.

Process by means of publication is purely statutory and not according to the course of the common law, and it can only be instituted in the manner required by the statute. *Cooper* v. *Newell*, 173 U. S. 555, 572.

If the affidavit had been as to the defendant's domicile, which may present a mixed question of law and fact, there would be some basis for the contention that an affidavit upon information and belief would be sufficient, but as to the mere fact of residence the affidavit must be positive. *Jackson* v. *Webster*, 6 Munf. (Va.) 462, 464; *Clowser* v. *Hall*, 80 Virginia, 864.

Judgments which have an effect on personal rights, as in divorce suits, are not to be assimilated too closely to those cases in which the jurisdiction is acquired by seizure of the property involved. *Cooper* v. *Reynolds*, 10 Wall. 308, 319; *Hamilton* v. *Brown*, 161 U. S. 256, 274; *Haddock* v. *Haddock*, 201 U. S. 562, 576; *Dargan* v. *Richardson*, Dud. (S. C.) 62; *Allen* v. *Scurry*, 1 Yerg. (Tenn.) 36; *Lockwood* v. *Nye*, 2 Swan (Tenn.), 515; and see *In re Pensacola Lumber Co.*, 8 Benedict, 171, 174.

Mr. Joseph W. Cox, with whom *Mr. A. E. L. Leckie* and *Mr. John A. Kratz, Jr.*, were on the brief, for appellee:

This court is without jurisdiction; $5,000 is not involved.

The value must be actual value—not a value based upon speculation on possibilities. *Barry* v. *Mercein*, 5 How. 103; *Kurtz* v. *Moffitt*, 115 U. S. 487; *Durham* v. *Seymour*, 161 U. S. 235; *Huntington* v. *Saunders*, 163 U. S. 319; Foster's Fed. Practice, Vol. 1, 4th Ed., p. 87.

The decree of the Virginia court, if valid in Virginia, is binding upon the parties in the District of Columbia and a bar to the wife's claim for maintenance. *Atherton* v. *Atherton*, 181 U. S. 155. *Haddock* v. *Haddock*, 201 U. S. 562, does not apply to this case.

The two cases last cited hold that if a suit is brought at the matrimonial domicile of a husband whose domicile coincides with the domicile of matrimony, the decree obtained is, by virtue of the Constitution, entitled to full faith and credit; but that if the husband removes from the matrimonial domicile and the wife remains, a decree obtained by the husband in his new place of abode is not entitled to full faith and credit. And see *Downs* v. *Downs*, 23 App. D. C. 381; 14 Cyc. 729.

So long as the finding of wrongful desertion is undisturbed, the courts of Virginia could not allow maintenance to the wife. *Harris* v. *Harris*, 31 Gratt. 13, 17; *Carr* v. *Carr*, 22 Gratt. 168; *Latham* v. *Latham*, 30 Gratt. 338.

The effect of the decree in Virginia being to bar the wife's right to maintenance, it is also a bar to her suit for maintenance in the District of Columbia.

Under § 3233, Virginia Code, if appellant had sustained any injustice, by reason of the fact that she was an absent defendant and did not appear, she could at any time within three years have had said decree set aside by showing that it was inequitable or unjust to her.

The Virginia decree is not invalid in that State because of insufficiency of the affidavit filed as the basis of the order of publication.

Under § 3230, the affidavit is in all respects sufficient to form a basis for the publication. 7 Ency. Pl. & Pr. 110; 17 Ency. Pl. & Pr. 60; *Adam* v. *Hudson*, 98 Michigan, 51; *Pennoyer* v. *Neff*, 95 U. S. 714, 721; *Long* v. *Fife*, 45 Kansas, 271; *Belmont* v. *Cornen*, 82 N. Y. 256; *Rowe* v. *Palmer*, 29 Kansas, 240; *Smith* v. *Smith*, 3 Oregon, 363; *Ligare* v. *R. Co.*, 76 California, 610; *Lawson* v. *Moorman*, 85 Virginia, 880; *Harris* v. *Claflin*, 36 Kansas, 543; *Briton* v. *Larson*, 23 Nebraska, 806; *Fulton* v. *Levy*, 21 Nebraska, 478.

The giving of personal notice in the District of Columbia did not vitiate the constructive notice of publication and render the decree void in Virginia. 7 Ency. Pl. & Pr., p. 109; *Burnes* v. *Burnes*, 61 Mo. App. 612; *Dresser* v. *Wood*, 15 Kansas, 344.

In any event, the wife failed upon the testimony offered to establish that she was entitled to maintenance.

MR. JUSTICE PITNEY delivered the opinion of the court.

This is an appeal from a decree of the Court of Appeals of the District of Columbia, reversing a decree of the Supreme Court of the District in favor of the wife in a suit for maintenance, brought under § 980 of the District Code, act of March 3, 1901, 31 Stat. 1346, c. 854. The bill of complaint was filed July 29, 1907, and charged the husband with failing and refusing to maintain the complainant and with cruel treatment of such character as to compel her to leave him. Upon the filing of the bill a subpœna to answer was issued and returned "not found," whereupon *alias* and *pluries* writs were successively issued and returned until November 18, 1907, when the husband was served with process. Meanwhile, and on September 3, 1907, he brought suit against the wife in the Circuit Court of Loudoun County, Virginia, for divorce *a mensa et thoro*, upon the ground that on June 13, 1907, the wife wilfully abandoned his bed and board and deserted him

without cause, and that notwithstanding his repeated entreaties and endeavors to induce her to return she had refused to do so. An order of publication having been made and published, the Virginia court, on October 19, 1907, made a decree granting to the husband a divorce *a mensa et thoro*. He thereafter, on being served as already mentioned with process in the wife's suit, filed a plea setting up the Virginia decree and the proceedings upon which it was rendered, as a bar to her action. This plea was, on hearing, overruled, the husband being allowed time in which to answer the bill. He answered, denying the wife's charges of cruelty and setting up other matters pertaining to the merits, and also averred that his domicile, as well as the matrimonial domicile of the parties, was in Loudoun County, Virginia, and again pleaded the Virginia proceedings and decree as a bar to the wife's suit. The Supreme Court of the District upon final hearing held the Virginia divorce to be invalid and made a decree awarding to the wife custody of an infant child born to the parties during the pendency of the proceedings, and requiring the husband to pay to the wife $75 per month for the maintenance of herself and the child, to forthwith pay to her the sum of $500 for counsel fees, and also to pay the costs of suit to be taxed. From this decree the husband appealed to the Court of Appeals of the District, which court reversed the decree and remanded the cause, with directions to enter an order vacating the decree and dismissing the bill. 35 App. D. C. 14.

The present appeal is based upon § 8 of the act of February 9, 1893, to establish a Court of Appeals for the District of Columbia, and for other purposes (27 Stat. 434, 436, c. 74), which section gives a writ of error or appeal to review in this court any final judgment or decree of the Court of Appeals "in all causes in which the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars." Appellee challenges our jurisdiction

on the ground that the matter here in dispute does not exceed the sum mentioned.

Under the decree of the Supreme Court the payments of $75 per month for support of the wife and child were to commence on July 15, 1909. Supposing that decree to be now reinstated by a reversal of the decree of the Court of Appeals, the installments already accrued would amount to considerably more than one-half of the jurisdictional amount. The expectancy of life of the parties is clearly sufficient to make up the balance.

It is true that the obligation to make such payments for maintenance in the future, even when fixed by judicial decree, is not in the nature of a technical debt.

Section 980 of the District Code (31 Stat. 1346, c. 854) upon which the present action is based, enacts—"Whenever any husband shall fail or refuse to maintain his wife and minor children, if any, although able to do so, the court, on application of the wife, may decree that he shall pay her, periodically, such sums as would be allowed to her as permanent alimony in case of divorce for the maintenance of herself and the minor children committed to her care by the court, and the payment thereof may be enforced in the same manner as directed in regard to such permanent alimony." The matter of permanent alimony is dealt with in §§ 976, 977 and 978, the latter of which provides—"After a decree of divorce in any case granting alimony and providing for the care and custody of children, the case shall still be considered open for any future orders in those respects."

The statutory maintenance is thus assimilated to alimony, in that it is subject to be modified from time to time or even cut off entirely, in the event of a change in the circumstances of the parties; and it of course ceases wholly upon the death of the husband. See *Lynde* v. *Lynde*, 181 U. S. 183; *Audubon* v. *Shufeldt*, 181 U. S. 575, 578; *Lynde* v. *Lynde*, 64 N. J. Eq. 736, 751.

Nevertheless, such a decree clearly and finally settles the obligation of the husband to contribute to the support of the wife and offspring, and fixes the amount of contributions required for the present to fulfill that obligation. The future payments are not in any proper sense contingent or speculative, although they are subject to be increased, decreased or even cut off, as just indicated.

The statute conferring jurisdiction on this court, while requiring that the matter in dispute shall exceed five thousand dollars, does not require that it shall be of such a nature as to constitute (if the event be favorable) a technical debt of record. In *Smith* v. *Whitney*, 116 U. S. 167, 173, the matter in dispute was stated to be "whether the petitioner is subject to a prosecution which may end in a sentence dismissing him from the service, and depriving him of a salary, as paymaster general during the residue of his term as such, and as pay inspector afterwards, which in less than two years would exceed the sum of five thousand dollars." This court sustained the appellate jurisdiction. That case has been repeatedly cited upon the present point, *Smith* v. *Adams*, 130 U. S. 167, 175; *South Carolina* v. *Seymour*, 153 U. S. 353, 358; *Simon* v. *House*, 46 Fed. Rep. 317, 318; *Chesapeake & Delaware Canal Co.* v. *Gring*, 159 Fed. Rep. 662, 664; and its authority upholds our jurisdiction in the case before us.

The next question is whether the Court of Appeals was right in holding that the Supreme Court of the District erred in refusing to give credit to the Virginia decree.

Art. IV, § 1, of the Constitution declares that "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." By § 905, Rev. Stat., the mode in which such acts, records, and proceedings are to be proved was prescribed; and it was enacted

that "The said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken." This latter clause finds its origin in the first act passed by Congress to carry into effect the constitutional mandate (act of May 26, 1790, c. 11, 1 Stat. 122); and, in an early case, it was held that the words "every court within the United States" include the courts of the District of Columbia, and require those courts to give full faith and credit to the judicial proceedings of the several States when properly authenticated. *Mills* v. *Duryee*, 7 Cranch, 481, 484, 485.

But it is established that the full faith and credit clause, and the statutes enacted thereunder, do not apply to judgments rendered by a court having no jurisdiction of the parties or subject-matter, or of the *res* in proceedings *in rem*. *D'Arcy* v. *Ketchum*, 11 How. 165; *Thompson* v. *Whitman*, 18 Wall. 457; *Reynolds* v. *Stockton*, 140 U. S. 254; *Bigelow* v. *Old Dominion Copper Co.*, 225 U. S. 111, 134.

This subject in its relation to actions for divorce has been most exhaustively considered by this court in two recent cases; *Atherton* v. *Atherton*, 181 U. S. 155; *Haddock* v. *Haddock*, 201 U. S. 562. In the *Atherton Case* the matrimonial domicile was in Kentucky, which was also the domicile of the husband. The wife left him there and returned to the home of her mother in the State of New York. He began suit in Kentucky for a divorce *a vinculo matrimonii* because of her abandonment, which was a cause of divorce by the laws of Kentucky, and took such proceedings to give her notice as the laws of that State required, which included mailing of notice to the post-office nearest her residence in New York. No response or appearance having been made by her, the Kentucky court proceeded to take evidence and grant to the hus-

band an absolute decree of divorce. It was held that this decree was entitled to full faith and credit in the courts of New York. In the *Haddock Case*, the husband and wife were domiciled in New York, and the husband left her there, and, after some years, acquired a domicile in Connecticut, and obtained in that State, and in accordance with its laws, a judgment of divorce, based upon constructive and not actual service of process on the wife, she having meanwhile retained her domicile in New York, and having made no appearance in the action. The wife afterwards sued for divorce in New York, and obtained personal service in that State upon the husband. The New York court refused to give credit to the Connecticut judgment, and this court held that there was no violation of the full faith and credit clause in the refusal, and this because there was not at any time a matrimonial domicile in the State of Connecticut, and therefore the *res*—the marriage status—was not within the sweep of the judicial power of that State.

In the present case it appears that the parties were married in the State of Virginia, and had a matrimonial domicile there, and not in the District of Columbia or elsewhere. The husband had his actual domicile in that State at all times until and after the conclusion of the litigation. It is clear, therefore, under the decision in the *Atherton Case* and the principles upon which it rests, that the State of Virginia had jurisdiction over the marriage relation, and the proper courts of that State could proceed to adjudicate respecting it upon grounds recognized by the laws of that State, although the wife had left the jurisdiction and could not be reached by formal process.

But in order to make a divorce valid even when granted by the courts of the State of the matrimonial domicile, there must be notice to the defendant, either by service of process, or (if the defendant be a non-resident) by such publication or other constructive notice as is required by

the law of the State. *Cheely* v. *Clayton*, 110 U. S. 701. *Atherton* v. *Atherton*, 181 U. S. 155, 171, 172. In *Cheely* v. *Clayton*, because the notice was published against the defendant without making such effort as the local law required to serve process upon her within the State, this court held, following repeated decisions of the state court, that the decree of divorce was wholly void for want of jurisdiction in the court that granted it; and that the liberty conferred by the local statute upon a defendant on whom constructive service only had been made to apply within three years to set the decree aside did not make it valid when the constructive service was so defective.

The Virginia decree now in question is attacked for want of jurisdiction on the ground that the affidavit used as a basis for the order of publication was made upon information and belief, and not upon personal knowledge. It is insisted that the order was therefore unauthorized and all proceedings based upon it null and void.

By § 3230 of the Virginia Code it is provided that—"On affidavit that a defendant is not a resident of this State . . . an order of publication may be entered against such defendant." Succeeding sections prescribe the form of the order, the mode of publication, and the proceedings to be taken when the order has been thus executed.

The record of the Virginia proceedings shows that on September 3, 1907, in the clerk's office of the Circuit Court of Loudoun County, "the said Charles N. Thompson filed an affidavit setting forth that the said Jessie E. Thompson was not a resident of the State of Virginia, said affidavit to be used as basis for an order of publication against the said Jessie E. Thompson, . . . in the words and figures following, to wit: 'Charles N. Thompson, plaintiff, this day made oath before me in said office that Jessie E. Thompson defendant in the suit aforesaid, is not a resident of the said State, as he is informed and verily believes.'"

This was certified by the clerk of the court as permitted by the state practice. The order of publication follows, which, after setting forth the title of the court, the names of the parties and the object of the suit, proceeds thus: "It appearing from legal evidence that the said defendant is not a resident of this State, it is ordered that she do appear within fifteen days after due publication hereof, in the clerk's office of our said court, and do what is necessary to protect her interests." There follow certificates of the publication and public posting of the required notice, and subsequent proceedings resulting in the final decree, which is to the following effect: "It appearing that the complainant hath proceeded regularly at rules to mature his suit against defendant, who is a non-resident of Virginia, both by personal service of process and by publication, in the mode prescribed by statute, this case was set down for hearing and came on this day to be heard on said proceedings at rules, the bill of complaint and the depositions of witnesses regularly taken and returned to the court; on consideration whereof, the court being of the opinion that complainant hath made out his case by legal evidence, doth adjudge, order and decree that the prayer of the bill be and the same is hereby granted; that the complainant, Charles N. Thompson, be and hereby is granted a divorce *a mensa et thoro* from said defendant Jessie E. Thompson; and that each of them be and he and she are divested of all marital rights in the other's property. And it is further ordered that this cause be placed upon the suspended docket, with leave to the complainant to apply for further relief whenever he may be advised that he is entitled thereto." (*Note:* We disregard the recital of "personal service of process," because the service referred to appears to have been made in the District of Columbia, and whether it was in season to serve any useful purpose under the Virginia practice is questionable.)

The record clearly imports a determination by the Virginia court that the affidavit of non-residence, although based upon information and belief, amounted to "legal evidence," and was in conformity with "the mode prescribed by statute." We are not referred to any provision of the Virginia Code, nor to any decision of the courts of that State, that excludes the use of such evidence for such a purpose. Section 3282 of the Code provides that "where an affidavit is required in support of any pleading, it shall be sufficient, if the affiant swear that he believes it to be true." Under the Code of 1874, chap. 148, § 1, which provided for the issuance of a writ of attachment against non-resident debtors, and required "an affidavit stating the amount and justice of the claim, that there is present cause of action therefor, that the defendant or one of the defendants is not a resident of this State, and that the affiant believes he has estate or debts due him within the county or corporation in which the suit is," it was held that so much of the affidavit as set forth the amount and justice of the claim, that there was present cause of action therefor, and that the defendant was non-resident in the State, must be absolute, and not made upon information and belief. *Clowser* v. *Hall*, 80 Virginia, 864. This decision was in 1885, and thereafter the section relating to foreign attachments was amended by permitting all of the averments of the affidavit to be based upon the belief of the plaintiff, his agent or attorney. Va. Code, § 2959.

We are not able to discover here or elsewhere any general law or policy of the State of Virginia excluding the use of affidavits based upon information and belief as the foundation of an order of publication. In the very decree before us the Virginia court has adjudged such an affidavit to be sufficient. We are therefore bound to assume that the use of such an affidavit is in accord with proper practice in that State.

But, were it otherwise, it seems well settled that where the affidavit used as the basis for an order of publication is defective, not in omitting to state a material fact, but in the mode of stating it or in the degree of proof, the resulting judgment, even though erroneous and therefore voidable by direct attack, cannot be said to be *coram non judice* and therefore void on its face. *Atkins* v. *Atkins*, 9 Nebraska, 191, 200; *Pettiford* v. *Zoellner*, 45 Michigan, 358, 362; *Adams* v. *Circuit Judge*, 98 Michigan, 51; *Long* v. *Fife*, 45 Kansas, 271; *Belmont* v. *Cornen*, 82 N. Y. 256; 7 Encyc. Pl. & Pr. 110; 17 Encyc. Pl. & Pr. 60, 61.

The material fact upon which, according to the laws of that State, the jurisdiction of the Virginia court depended, was the non-residence of the defendant. The Code required (§ 3230) that this fact should appear by affidavit. The affidavit in question set forth the fact; the circumstance that it was averred on information and belief affected merely the degree of proof. In the absence of any local law excluding the use of such an affidavit the decision of the state court accepting it as legal evidence must be deemed sufficient on collateral attack to confer jurisdiction on that court over the subject-matter in accordance with local laws.

This being so, it is clear that the resulting decree is entitled, under the act of Congress, to the same faith and credit that it would have by law or usage in the courts of Virginia. As the laws of that State provide for a divorce from bed and board for the cause of desertion, and confer jurisdiction of suits for divorce upon the Circuit Courts, (Va. Code, §§ 2257, 2258, 2259, 2260, 2264, 2266; *Bailey* v. *Bailey*, 21 Gratt. 43; *Carr* v. *Carr*, 22 Gratt. 168; *Latham* v. *Latham*, 30 Gratt. 307); and since the courts of Virginia hold upon general principles that alimony has its origin in the legal obligation of the husband to maintain his wife, and that although this is her right she may by her conduct forfeit it, and where she is the offender she cannot

have alimony on a divorce decreed in favor of the husband, (*Harris* v. *Harris*, 31 Gratt. 13), it is plain that such a decree forecloses any right of the wife to have alimony or equivalent maintenance from her husband under the law of Virginia.

From this it results that the Court of Appeals of the District of Columbia correctly held that the Virginia decree barred the wife's action for maintenance in the courts of this District.

Decree affirmed.